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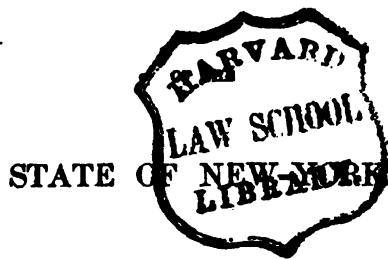
PRACTICE REPORTS

IN THE

S U P R E M E C O U R T _P

AND

C O U R T O F A P P E A L S



BY NATHAN HOWARD, JR.,
COUNSELLOR-AT-LAW, NEW-YORK.

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SUPERIOR COURT.

THE REPUBLIC OF MEXICO agt. FRANCISCO DE ARRANGOIS,
BARTOLOMI BLANCO, and RAMON PALANCA.

Suits may be brought in our courts by foreign governments in the federative name; but our proceedings must be adapted to the case, so as to do justice to all parties;

Or, there must be a party to the record with competent authority from his government to act on its behalf.

Therefore, the Republic of Mexico may maintain an action in the name of the republic as an aggregate body; and the modes of proceeding in cases of foreign corporations, and of other states of the union, may be resorted to for the regulations of the practice.

The language of the Code admits of the court treating an *undertaking*, signed by an admitted agent of a foreign government appointed to sue, to be an undertaking on the part of the *plaintiff*.

By the decision in the court of appeals in *Valarino agt. Thompson*, (3 *Selden*, 576,) it is settled that it is the right and privilege of the United States, that a foreign consul residing here should be sued by the federal courts. Under an admitted constitutional power, the state courts are excluded from jurisdiction. The case of *Flynn agt. Stoughton* (5 *Barb. S. C. R.* 113,) is overruled.

The construction of the second subdivision of the 179th section of the Code is, that a defendant may be arrested in an action *for money received*, where he is a factor, attorney, agent, &c., or other person in a fiduciary capacity; and that the same designated persons may be arrested for property embezzled or fraudulently misapplied by them. There are two cases for the arrest; and the enumerated persons may be arrested in either of them.

In one class of cases, under § 179, the order of arrest may be made upon *facts* which may be entirely *independent of the cause of action*; which are to be stated in affidavits, and need not be stated in the complaint; and where the arrest may take place after the cause has actually been tried.

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In the other class, under that section, where a defendant is sought to be arrested as an agent for receiving money, the ground of action and the ground of arrest are identical. If the cause of action is shown to be unfounded, the cause of *arrest* must fail. If the affidavits destroy the allegation of a fiduciary character, the arrest cannot be sustained, although that will not terminate the suit.

Where, in these last mentioned cases, the defendant raises a *fair legal presumption* that his claim may be supported, the arrest should not be sustained. Under the Code now, a case of arrest—of bail or no bail—may be decided upon affidavits which tend to decide the cause as then presented. (*See 2 Selden*, 562.)

In this case, the defendant, having been entrusted by the Mexican government with a duty of delicacy and high importance—an agency to pay out and superintend for the plaintiff—which had been accomplished with admitted skill and promptitude; and, under all the facts,

Held, that the defendant showed a right to a compensation, by way of commission from his government—(the amount claimed and withheld by the defendant, being the cause of action and arrest.) But the court must decide, even on a motion to discharge from arrest, how far such a claim can be sustained, and the extent of the compensation so to be allowed the defendant, when the plaintiff appears entitled to some, though not to all that he demands.

Special Term, January and February, 1855.

ON motion to discharge the arrest of the defendant, Arrangois.

DANIEL LORD, *for plaintiff*.

JOHN & W. H. ANTHON, *for defendants*.

HOFFMAN, Justice. The defendant, Francisco de Arrangois, having been arrested under an order made by one of the justices of this court, and given bail to the amount of \$60,000, now applies to be discharged upon the insufficiency of the affidavit on which the order was granted, and upon further affidavits and documents on his own part.

The first question relates to the form of the undertaking given upon the arrest, and this materially depends upon the correct understanding of the position of the plaintiff upon the record

The right of a foreign SOVEREIGN to sue in the courts of England, upon which Lord THURLOW entertained doubts, has

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been fully settled and sustained. In the case of *The King of Spain* agt. *Machado*, (4 *Russell*, 560, & 1 *Bligh* U. S. 60,) Lord REDESDALE speaks of it as one of the clearest cases that could be stated: "that he sues as a sovereign, either on his own behalf, or on behalf of his subjects." (See also *The Nabob of the Carnatic* agt. *The East India Company*, 1 *Vesey*, jr., 371; *The King of Hanover* agt. *Wheatley*, 4 *Beavan*, 78; *Hullett* agt. *The King of Spain*, 2 *Bligh* U. S. 31, and 1 *Clark and Finnelly*, 33.)

It will be seen, that in all the English cases in which the right to sue has been admitted, the plaintiff was a *monarch*, and was treated as an *individual*. The case of *The City of Berne* agt. *The Bank of England*, (9 *Vesey*, 348,) was decided upon the point of the state not having been recognized by the British government. It is also to be noticed that the bill was by a common councilman, on behalf of himself and his associates in the government. This appears from the report of the case of *Dolder* agt. *The Bank of England*, (10 *Vesey*, 358;) and in *Dolder* agt. *Huntingfield*, (11 *Vesey*, 283,) the suit was by individuals describing themselves as Llandamman and two Statholders of the Helvetic Republic, in whom the executive power was vested by the constitution.

When the case of *The King of Spain* agt. *Machado* was first before the court, it was held that two persons, the agents of the king, and to whom he had given a power of attorney to collect and deposit the funds, but who had no interest in the amount, could not be joined with the king as co-plaintiffs. (4 *Russell's Rep.* 225.)

The case of *The Colombian Government* agt. *Rothschild*, (1 *Simon's Rep.* 103,) is of importance in ascertaining the English rule, not merely because it was decided by a very able judge, (Sir JOHN LEACH,) but that it has received the sanction of Lord ELDON, Lord REDESDALE, and Lord BROUGHAM. (Compare the report in the house of lords in 1 *Dow. & Clark*, with that in 1st *Clark & Finnelly*, 33.)

The bill was, in form, by the government of the state of Colombia, and Don Manuel T. Hutado, a citizen of such state,

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and minister plenipotentiary from the same to the court of his Brittanic majesty, the place of his residence stated. On general demurrer, it was held that the bill could not be sustained. The vice-chancellor said, that a foreign state is as well entitled to the aid of the court, in asserting its rights, as any individual; but it must sue in a form which makes it possible for the court to do justice to the defendants. It must sue in the name of some public officers, who are entitled to sue in the name of the state, and upon whom process can be served on the part of the defendants, and who can be called upon to answer a cross bill. The general description of the Colombian government precluded the defendants from these just rights, and no instance could be stated in which the court had entertained the suit of a foreign state, by such a description.

The English authorities appear to settle these points. That the sovereign of a foreign country may sue in the tribunals of the realm, but he sues as an individual. An action cannot be sustained in the name of his agent, although they may be regularly empowered to act in the identical business. He is the party in interest. He must swear to an answer to a cross bill, if one is required. He would be the party to be examined personally, whenever such an examination was warranted by the rules of the court.

Again: If a state sues, without the individuality of a monarch, some public officer representing it must be upon the record; and it seems that a minister plenipotentiary is not such an officer.

I cannot but think that an examination of the old cases, referred to by counsel in *The Nabob of the Carnatic* agt. *The East India Company*, will tend to prove that an ambassador may sustain an action on behalf of his sovereign, notwithstanding the doubts of Lord ROSSLYN upon the subject. (3 *Vesey*, 431.)

In *The King of Spain* agt. *Oliver*, (1 *Peter's C. C. Rep.* 217, 276,) an action for the recovery of duties, alleged to be payable to the crown, was brought in the circuit court, and decided upon its merits. It appears that an application was made for

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a continuance, to take testimony under a commission, upon the affidavit of the Spanish minister.

These are all the authorities I have been able to find upon the subject; and I believe the question is entirely new in our country. The principle which pervades the English cases is marked by that spirit of equality and justice which is the inmate of English tribunals, and that principle places the sovereign and the peasant upon the same footing.

But the reason of the English rule lies deeper. It has its origin in that leading doctrine of European policy which, in the language of Guizot, places "the personification of the state in the institution of monarchy." This embodiment of the commonwealth in the individual has given way, over the continent of America, to the idea of the concentration of the power of the people in an abstraction. Legitimate sovereignty does not find its representative in a king with his personality, but in a republic with its idealism.

Still there is the same brotherhood and communion of states to be recognized. The same family of nations, though with different names and different forms, exist; and their rights, and their responsibilities, must be forever the same. The catholic law of nations is identical in its application to all.

We must then admit these recognized governments to sue in our courts under their federative title, and adapt our forms of proceeding, if possible, so as to do justice to all parties; or we must allow an individual representative, clothed with competent authority from his government, to act on its behalf, and thus have a party on the record who can be strictly subjected to those forms.

In my opinion, the action can be maintained in the name of the republic as an aggregate body; and the modes of proceeding in cases of foreign corporations, and of other states of the union may be resorted to for the regulations of the practice.

Before the Revised Statutes had embodied the law into an express provision, Chancellor KENT had decided that a foreign corporation could file a bill in our court of chancery, as well as sustain a suit at law. (*Silver Lake Bank of Pennsylvania* agt.

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North, 4 *John. C. R.* 371.) Such a suit was brought in this court in *The Holyoke Bank* agt. *Hastings*, (4 *Sandf. Rep.* 675.)

Our highest court has also settled, that either of the states of the Union may sue in our state courts; and difficulties of practice are not found insuperable. (*State of Illinois* agt. *Delafield*, 2 *Hill*, 159; 8 *Paige*, 527; *State of Indiana* agt. *Woram*, 6 *Hill*, 36.)

With these views, I consider that the objection to the undertaking is not tenable. The language of the Code admits of the court treating an undertaking, signed by an admitted agent of a foreign government appointed to sue, to be an undertaking on the part of the plaintiff. In the case of *Richardson* agt. *Crary*, (1 *Duer*, 666,) referred to by the counsel of the defendant, the instrument was executed by sureties alone; neither by the plaintiff nor by any one on his behalf.

2d. The question, whether the defendant filled any, and what office under his government, and the time of the execution of these services, is next to be considered. It becomes of importance in any view of the application.

In the affidavit of General Almonte, on which the order of arrest is founded, it is alleged that, at the time of the reception of the monies mentioned, the defendant was an officer and agent of the republic, having, as such, a salary of \$3,000 per annum; that he acted in the business only as an officer or agent having a stated salary; and that the defendant, after receiving the money, resigned his office and employment. The affidavit avoids stating what that office was.

In the letter from the office of secretary of state, and of the department of foreign relations, dated July 17th, 1854, regulations are prescribed as to the salaries of consuls, and the minister plenipotentiary directed to carry them into effect. In pursuance of these instructions, General Almonte addressed an official letter to the defendant, under date of the 2d of August, 1854, asking information as to his salary, and entitling him, "The Consul General of the Republic," &c., &c.

On the 8th of August, 1854, the defendant signs a receipt for his salary, as Consul General in the United States, for one

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year in advance; on the 4th of August the treaty money was paid to him.

In two of the series of letters addressed to the defendant from the various departments of the government, dated the 19th of July, 1854, and empowering him to receive the money, he is addressed as "Consul General of the Republic in the United States."

This is the case upon the documents, apart from the defendant's affidavit. It follows from them that the defendant was, at the time of his employment and agency, the Consul General of the republic of Mexico, and continued so until the 8th of August. It is manifest, that if he was not Consul General, he was not acting, at the time of such agency, in any other station as an officer on a salary. It is also clear, that if he remained Consul General at the commencement of this action, the court has not any jurisdiction of the cause.

The doubts heretofore existing as to the operation of the act of congress of September 24, 1789, are terminated by the decision in the court of appeals in *Valarino agt. Thompson*, (3 *Selden's Rep.* 576.) It is there settled, not merely that a consul does not lose his exemption by reason of omitting to plead it, but that the ground of his exemption from a suit in a state court is not a personal privilege, nor even the right of his sovereign; but that it is the right and privilege of the United States that he should be sued in the federal courts. Under an admitted constitutional power, the state courts are excluded from jurisdiction. The case of *Flynn agt. Stoughton*, (5 *Barb. S. C. Rep.* 113,) is then over-ruled.

In this view, the importance of the plaintiff's allegation, that he resigned the office which he had held *after the reception of the money* is apparent. The receipt of the 8th of August, four days after the money was paid to him, speaks of his salary as consul being paid in advance. The Mexican minister, on the 2d of August, addresses him as Consul General. I should not know how to resist the presumption that he continued such consul to the present hour, if his own affidavit does not remove

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the difficulty. After a careful examination of it, I am of opinion that it is sufficient to do so.

He says, that he was appointed Consul General, &c., to reside in New-York, and was afterwards established in New Orleans. That he received instructions, dated the 14th of July, to leave to the Vice-Consul the discharge of his duties at New Orleans, and to proceed to New-York as a special commissioner, to take the monies from the hands of the plaintiff, and, if necessary, to assume his place as minister; that he received such instructions on the 25th of July, *abandoned* his office, and proceeded to New-York. He says, that he held no office at all properly so called when he commenced performing the duties in question, the consulate being a commercial agency, and its functions having been renounced by him, and *never again assumed*. He also explains away his receipt for his salary as consul. Whether successful or not, it is of moment to show his renunciation of the character.

It is remarkable that no formal act of official resignation is exhibited by the defendant; and it is left doubtful whether at this moment he is not *de facto* the consul of his government.

I am inclined, however, to think that, for the purposes of this suit, his admissions are sufficient to prevent the act of congress from applying, and to authorize the action in this court. That he will be hereafter absolutely estopped from claiming his privilege, even if he now possesses the office. It then results that the plaintiff must take his statement of renunciation of the office, or the presumption must be that he retains it.

If this is the case, the Mexican government must submit to consider him as a special agent or commissioner to receive the money, and as a banker to meet the drafts, and disburse the funds. The authorities there cited do not bear directly upon the case, for there was no official character belonging to the defendant with a salary attached to it. It may, however, be remarked, as to those cases, that a remuneration was provided for the services, directly or indirectly, by sanction of law. If there was no proper officer to perform them, or he was dis-

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abled, the one employed succeeded to the duty, and took the compensation allowed for its performance. (*United States agt. M^r Daniel*, 7 *Peters*, 1; *Same agt. Ripley*, *id.* 18; *Andrews agt. United States*, 2 *Story's Rep.* 208; *United States agt. Duval, Gilpin*, 356; *United States agt. Gratiot*, 15 *Peters*, 336; *United States agt. Buchanan*, 8 *Howard*, 102.)

Thus, then, the case is narrowed down to one of a special agent, receiving money for his employer, authorized and required to deposit it in his own individual name, where it could be readily appropriated, and required to meet the drafts of his principal upon it. He performs this office and business to the whole extent of the fund in his hands, except a balance which he claims to retain as a proper commission for his services.

The construction of the second subdivision of the 179th section of the Code, I apprehend is this: That a defendant may be arrested in an action *for money received*, where he is a factor, attorney, agent, &c., or other person in a fiduciary capacity. And again, that the same designated persons may be arrested for property embezzled, or fraudulently misapplied by them. There are two cases for the arrest, and the enumerated persons may be arrested in either of them.

It is of importance here to notice the distinction which exists as to cases under the 179th section. In one class, the order of arrest may be made upon facts, which may be entirely independent of the cause of action; which are to be stated in affidavits, and need not be stated in the complaint, and where the arrest may take place after the cause has actually been tried. (*Cheeny agt. Garbut*, 5 *Howard*, 468; *Field agt. Morse*, 7 *Howard*, 12; *Gardner agt. Clark*, 17 *Barb.* 646; *Corwin agt. Freeland*, 2 *Selden*, 502; *Lee agt. Elias*, 3 *Sandf. S. C. Rep.* 736.)

Under subdivision four, for example, the action may be for goods sold and delivered, and the arrest be founded upon fraud in obtaining the goods. The latter may entirely fail, and the former succeed. They are so distinct that the ground on which the arrest is to be obtained ought not to appear in the complaint.

On the other side, where a defendant is sought to be arrested

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as an agent receiving money, the ground of action and the ground of arrest are identical. The plaintiff cannot obtain the one, unless he appears entitled to succeed in the other. If his cause of action is shown to be unfounded, his cause of arrest must fail. If the affidavits destroy the allegation of a fiduciary character, the arrest cannot be sustained, although that will not terminate the suit. In this respect the analogy to an old injunction cause is close. The answer may be so full and explicit as to require the dissolution of an injunction, but yet the suit proceed, for the testimony might disprove it.

An opinion has been entertained by several judges, that the arrest must be sustained, unless a case is made out showing that the plaintiff cannot possibly succeed in his suit. I speak, of course, of cases of the present class. It strikes me to be a better rule—one more sanctioned by analogy, as it is more in favor of liberty—to hold that the arrest shall not be sustained, where the defendant raises a fair legal presumption that his claim may be supported.

We are to recollect, in these cases, that the Code has introduced a new element in our law upon this subject. A case of arrest—of bail or no bail—may be decided upon affidavits which tend to decide the cause as then presented. The court of appeals recognize this to be the result of their own construction of the Code. (2 *Selden*, 562.) The delicacy and difficulty of such a position for a judge, is daily experienced.

Applying the law thus stated to the facts of this case, as now presented, I have come to the conclusion that the defendant shows a right to a compensation, by way of commission, from his government.

The case of *Gardner agt. Dunbar*, (17 *Barb. Rep.* 644,) referred to by counsel, is very pertinent. The distinction is there taken, between an agency merely to sell and account for the balance immediately after deducting commissions, and where there is a general charge of the principal's business, paying debts, and assuming liabilities for him, and then to sell the property. The only agency that the Code refers to was one to sell and collect. The agency to pay out and superin-

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tend for the plaintiff, was the principal part of the defendant's duty. The plaintiff looked to him as a debtor, rather than as an agent.

The Mexican government, in this case, entrusted what it deemed a duty of delicacy and high importance to the defendant. It has been accomplished with admitted skill and promptitude, and, unless there is in this present claim a breach of faith and trust, with acknowledged fidelity. The services were of a mercantile nature. He requires a compensation in money, and mercantile law and usage sanction it.

But the line of reasoning, and the authorities which give the power, and make it the duty of the court, to judge of the right of action upon such a motion, require it to decide how far a claim can be sustained, when the plaintiff appears entitled to some, though not to all that he demands.

It is my duty in this case to pass upon the extent of the compensation to be allowed, upon all the facts before me, as well as upon the right to any compensation. And, in my opinion, the sum withheld is disproportionate to the services rendered. I am of opinion that one half per cent. would be proper and sufficient; and it therefore results that the amount of the security in this case should be reduced to \$30,000, and the order of arrest should be so far modified.

SUPREME COURT.

STEPHEN S. SHELDON, adm'r, &c., respondent, agt. JAS. HOY,
appellant.

Where an action of *trover* is brought by a plaintiff, as administrator, for a conversion of the property during the lifetime of the intestate, the complaint must state the fact that the plaintiff *is administrator*, and has been regularly appointed by the surrogate of some county in this state; because, it is a material and traversable fact, and must be stated in such form as to *tender an issue* to the other party.

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A complaint commencing, "A—— B——, administrator of the goods, chattels and credits of C—— D——, late of——, deceased, plaintiff in this action, complains," &c., is a *descriptio personæ* merely, and insufficient to show that the plaintiff prosecutes in a *representative* capacity; it must be regarded as a complaint by the plaintiff in his own right.

But an administrator can bring *trover* in his own name, without declaring in his representative capacity, for the goods of his intestate converted after his death, even though the conversion was before the granting of administration.

Where the plaintiff alleges that he was possessed, as administrator, of the goods, it is equivalent to an allegation that he was lawfully possessed, if it is not that he had title as well as possession. The term "possessed," imports that it is held by lawful title.

An allegation that "the property, after being in the possession of the plaintiff, came into the possession of the defendant, who, although requested so to do, has not delivered the same to the plaintiff, but wrongfully detains the said goods from him," is sufficient (if true) to establish a *conversion*. A wrongful *detention*, against the demand of the true owner, is a conversion, as much so as a wrongful *taking*.

Seventh District, General Term, March, 1855.

JOHNSON, WELLES, and T. R. STRONG, Justices.

APPEAL from order at special term overruling a demurrer.

The amended complaint in this action was as follows:—

"MONROE COUNTY, ss:—*Stephen S. Sheldon*, administrator of the goods, chattels, and credits of Job Phelps, late of Clarkson, deceased, plaintiff in this action, complains of James Hoy, defendant in this action, for this, to wit: That on the first day of September, 1851, at the town of Clarkson, in the county of Monroe, Job Phelps, deceased, was possessed, as of his own property, of one bay horse-colt, of the age of four or five years then past; one buggy wagon; and one double harness; and one promissory note of the amount of eighty dollars, dated about two years past, made by the said defendant; and one promissory note of the amount of fifty dollars, dated about one year then past, made by the said defendant;—of the value of three hundred dollars; and being so possessed thereof, the said goods, chattels, and credits, on the day and year first aforesaid, at the place aforesaid, came into possession of the said defendant, who, although often requested so to do, has not delivered the said goods, chattels, and credits aforesaid to the said plaintiff

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as administrator as aforesaid; and the said defendant wrongfully detains from the plaintiff, as administrator as aforesaid, the said goods, chattels, and credits aforesaid.

"And afterwards, to wit: on the 10th day of November, 1851, at the town of Clarkson, and in the county of Monroe, the said plaintiff, as administrator of the goods, chattels, and credits of Job Phelps, deceased, was possessed of one other bay horse-colt; one buggy wagon; one double harness; one promissory note of eighty dollars, dated about two years then past, made by the said defendant; and one promissory note of fifty dollars, dated about one year then past, made by the said defendant;—of the value of three hundred dollars; and being so possessed thereof, the said goods, chattels, and credits aforesaid, on the day and year aforesaid, and the place aforesaid, came into the possession of the defendant, who, although often requested so to do, has not as yet delivered the said goods, chattels, and credits aforesaid to the said plaintiff, as administrator as aforesaid; but wrongfully detains the said goods, chattels, and credits aforesaid from the said plaintiff, as administrator as aforesaid; wherefore the said plaintiff, as administrator as aforesaid, demands that the defendant may be adjudged to pay the said plaintiff, as administrator as aforesaid, the sum of three hundred dollars, with interest from the first day of November, 1851, besides costs.

"January 19, 1852."

To this complaint the defendant demurred,

1. It is not averred, and does not appear on the first count or pretended cause of action in the said complaint, that the plaintiff is the administrator of the goods, chattels, and credits of Job Phelps, deceased;

2. It does not appear that the defendant has converted to his use the goods, chattels, and credits, or any or either of them, in the said count or pretended cause of action mentioned;

5. It does not appear in the second count, or pretended cause of action in the said complaint, that the plaintiff ever had any

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property in, or right of possession of, the goods, chattels, and credits, or any or either of them, in the said second count or pretended cause of action mentioned ;

9. The said complaint does not state facts sufficient to constitute a cause of action.

SIMEON B. JEWETT, *for plaintiff.*

MUNGER & POMEROY, *for defendant.*

By the court—JOHNSON, Justice. The objections relied upon by the defendant's counsel are those stated in the first, second, and fifth grounds of demurrer.

The first count is for a conversion of the property during the lifetime of the intestate, and the plaintiff can maintain the action for that cause in a representative capacity only. It is conclusively settled by authority, that a complaint commencing like the present, and containing no other allegations or statement of fact of the plaintiff's appointment, does not allege that he is an administrator, or show that he prosecutes in that capacity. The introductory statement is a *descriptio personæ* merely. (*Merritt* agt. *Seaman*, 2 *Selden*, 168 ; *Gillett* agt. *Fairchild*, 4 *Denio*, 80, 83 ; *Beach* agt. *King*, 17 *Wend.* 197 ; *Stanley* agt. *Chappell*, 8 *Cow.* 235 ; *People* agt. *Mayor's Court*, 9 *Wend.* 490 ; *White* agt. *Law*, 7 *Barbour*, 204.) Many other cases might be cited, but it is unnecessary.

In *Merritt* agt. *Seaman*, the court of appeals reversed the judgment, on the ground that the defendant had recovered a set-off against the plaintiff in his representative capacity. The declaration was in form, except that the action was different, like the complaint here ; and it was held to be an action by the plaintiff in his individual, and not in his representative capacity, in which no set-off against the estate could be allowed.

This being, by the rules of pleading, a count in favor of the plaintiff in his individual right, it does not contain a statement of facts constituting a cause of action. The fact that the plaintiff is administrator, and has been regularly appointed by the

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surrogate of some county in this state, is a material and traversable fact, and must be stated in such form as to tender an issue to the other party. It will scarcely be pretended, that matter which is merely descriptive of the person of the plaintiff is issuable matter, or that it constitutes any part of the cause of action.

The learned judge, at the special term, is mistaken in supposing that the complaint in this case conforms to the former precedents. It will be seen, on examination, that in all the forms of declarations in *trover* by an administrator, there is contained, in addition to the general profert, in the body of each count, a particular averment of the granting of administration; and the first count was always to contain a particular statement of the time and place of granting, and the functionary by whom administration was granted to the plaintiff. (2 *Chit. Pl.* 840, 841, 6th *Am. from 5th London ed.* See also *Till. Form*, 438, 439.)

This must always have been necessary, as without such an averment the declarations would show no right in the plaintiff. The profert itself, I apprehend, was never traversable, although the excuse for omitting it was. (1 *Chit.* 398.) No action can, therefore, be maintained on the first count. It shows no title in the plaintiff, and no conversion by the defendant of the plaintiff's property, in any point of view.

But I am of opinion, that all the facts necessary to constitute a good cause of action, are stated in the second count. This is to be regarded as a complaint by the plaintiff in his own right, and not in his capacity as administrator.

An administrator could always bring *trover* in his own name, without declaring in his representative capacity, for the goods of his intestate converted after his death, even though the conversion was before the granting of administration. Because the granting of administration related back to the time of the death, and gave the administrator title by relation. (*Valentine agt. Jackson*, 9 *Wend.* 302.) This has not been changed by the Code.

Does, then, the second count state facts enough to establish the necessary right in the plaintiff to enable him to maintain the action in his own right? It states that he was possessed,

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as administrator, of the goods. This is equivalent to an allegation that he was lawfully possessed, if it is not that he had title as well as possession. But if this is to be regarded as no more than a simple allegation that he was possessed, I am inclined to the opinion that that is sufficient. The term "possessed" imports that it is held by lawful title. This being so, are facts stated which constitute a conversion in law? It is alleged that the property, after being in the possession of the plaintiff, came into the possession of the defendant, who, although often requested so to do, has not delivered the same to the plaintiff, but wrongfully detains the said goods from him. These allegations being true, do they establish a conversion? I think they do: all the facts which constitute a conversion are here stated.

It is true, that a conversion is essential to support the action. But a wrongful detention against the demand of the true owner is a conversion. It is as much so as a wrongful taking from his possession. Suppose the allegation had been that the defendant wrongfully took the property from the plaintiff's possession, and carried it away. Wrongful taking or wrongful detention amount to conversion; and where either fact is alleged, it is unnecessary to add, in addition, the legal conclusion that it was converted. It is said, that the allegation of a wrongful detention is a mere legal conclusion of the pleader. But it is no more so than the allegation that the property was converted. The fact asserted is, that the defendant wrongfully detained the plaintiff's property. The law adjudges this a conversion. The legal conclusion follows the fact established.

The ninth cause of demurrer is to the whole complaint; and the second count being good, the plaintiff must have judgment. The judgment of the special term must, therefore, be affirmed.

SUPREME COURT.

JAMES SAVAGE and others agt. HORACE PERKINS.

An action to recover the possession of personal property can now be brought, in the cases where replevin would lie, under the Revised Statutes.

Such an action is based upon the wrongful *detention* of the property; and such wrongful detention must exist *at the time of the commencement of the action*. But a person who has wrongfully delivered the property of another to a third person—even before the commencement of the action—may be said yet to wrongfully detain it.

The object of this action is the recovery of the property in *specie*; and if, *before suit brought*, the defendant unconditionally offers to restore the property, the object is already attained, and the suit is wholly unnecessary. Such offer is equivalent to a *tender* before suit brought. Although, in such actions, *damages* are recovered for the wrongful detention, yet they are merely incidents to the action.

If the plaintiff demands possession of personal property, which the defendant refuses to deliver, and before suit brought the defendant unconditionally offers to deliver the possession of it, the plaintiff, although he cannot maintain the action for the possession, may, nevertheless, have his action for the damages (if any) for refusing to deliver it when demanded, under § 167, (formerly *trover*,) for injury to property.

Erie Special Term, March, 1855.

MOTION by plaintiffs for a new trial on a bill of exceptions.

The action was for the recovery of personal property, and was tried at the Erie circuit in January, 1855.

On the trial it appeared that the plaintiffs, being forwarders of goods on the Erie canal, from Albany to Buffalo, and having an office for the transaction of their business at both places, shipped at Albany, on board of a canal boat owned and navigated by the defendant, on his own account, the property in question, consigning it to themselves in Buffalo. The property was charged with \$133.37 freight, payable to the defendant on its delivery to the consignee. After the defendant's boat arrived at Buffalo with the property on board, the defendant offered to deliver the property to the plaintiffs on being paid his freight. The plaintiffs declined receiving it then, for the

reason that several other boats, having cargoes consigned to the plaintiffs, which had arrived in port prior to the defendant's boat, were entitled to a preference; and the defendant could not discharge his cargo at the plaintiffs' storehouse until the cargoes of the other boats were discharged. After the defendant had remained in port three or four days, waiting for an opportunity to deliver the property, he made a claim for demurrage, and there was some controversy between the parties in relation thereto.

On the fifth day after the arrival, an agent of the plaintiffs' called on the defendant, and offered to pay him the amount of the freight, provided he would receive it in full of all charges. The defendant offered to take the money, but refused to receive it on those conditions, and the money was not paid. Nothing was said at this time about the delivery of the property.

On the morning of the same day—but whether before or after the money was offered, it did not appear—one of the plaintiffs called on the defendant and demanded a delivery of the property. The defendant refused to deliver it, unless his freight was first paid. No money was then tendered, but a friend of the plaintiffs', present at the time, said to the defendant, that when the property was out of the boat, so that it could be seen that it was all there, and in good order, the freight should be paid; but the defendant still refused to deliver it until his freight was paid.

Subsequently to all this, and about 4 P. M. of same day, (this being before the commencement of the action,) the defendant called upon the same plaintiff who had previously demanded the property, and said to him, that he might take the property. At this time the defendant's boat lay at the usual place of unloading.

The court charged the jury, among other things, that the defendant, having a lien upon the property for his freight, was not bound to part with the possession of it, except upon the payment of the freight; nor were the plaintiffs bound to pay the freight, except upon receiving the property. That a demand of the property by the plaintiffs would not put the de-

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defendant in default, and subject him to an action for the non-delivery thereof, unless such demand was accompanied by an offer to pay the freight. That the demand made by one of the plaintiffs in person did not put the defendant in default, unless they should find, from the evidence in relation to the transaction, that the demand was accompanied with an offer to pay the freight.

The court further charged that if such a tender, demand, and refusal had been made, as to entitle the plaintiff to maintain the action, yet that an unconditional offer, subsequently and before the commencement of the action, made by the defendant, to deliver the property, barred the plaintiffs' right of action. To the last part of the charge the plaintiffs excepted.

The jury found a verdict for the defendant, assessing the value of the property at \$133.60.

DYER TILLINGHAST, *for plaintiffs.*

W. H. ANDREWS, *for defendant.*

By the court—BOWEN, Justice. The only question made on the argument was upon the exception to the last part of the charge. The plaintiffs' counsel claimed that if, by reason of the refusal of the defendant to deliver the property to the plaintiffs, after an offer to pay the defendant the amount of his lien thereon for the freight, a right of action had accrued to recover the possession of the property, such right of action was not divested by a subsequent unconditional offer by the defendant, before suit brought, to deliver the property; and in support of his position he cited *Hanmer agt. Wilsey*, (17 Wend. 91.) That was an action of trespass for the taking of a horse by a constable from the plaintiff's stable, by the defendant's direction, on an attachment in the defendant's favor, illegally issued by a justice of the peace. After discovering the error in the issuing the attachment, the constable returned the horse to the stable from which it had been taken, and gave the plaintiff notice thereof, when the plaintiff said he should not receive the horse.

The action was commenced by declaration, which was filed

previous to the return of the horse, but served afterwards. The court held, that the plaintiff was not bound to receive the horse when returned to his stable. That the plaintiff's right of action to recover the value of the horse was perfect the moment after it was first taken from the stable, and could not be defeated by any act of the defendant, without the plaintiff's concurrence. That if the plaintiff had received the horse, it would not have defeated the action altogether, but would have mitigated the damages to be recovered. The case cited lays down the true rule as applicable to an action of trespass, or under the Code, to an action for the wrongful taking of personal property. Where property is wrongfully taken from the possession of the owner, such taking is a conversion thereof, and the owner is under no obligation to receive it again. The same rule is doubtless applicable to an action of *trover*, or for the conversion of property, where the original taking was lawful, if the offer to return was after an *actual* conversion.

But a demand and refusal is only *evidence* of a conversion. It is evidence from which a conversion will ordinarily be inferred, but not under all circumstances. (*Hill* agt. *Covell*, 1 Coms. 522; *Hayward* agt. *Seaward*, 1 *Moore & Scott*, 459.)

The case last cited was an action of *trover* for a steamboiler and apparatus. The boiler was left by the plaintiffs on the defendants' wharf, and shortly thereafter the plaintiffs sent a barge to the wharf for it. The defendants refused to deliver it unless £55 5s was paid for landing, clearing, and shipping it on the barge. The plaintiffs then tendered £23 2s., and demanded the boiler. The defendants refused to accept the sum tendered, or to return the boiler.

Afterwards, the plaintiffs' attorney wrote to the defendants, that he was instructed to commence an action for the detention of the boiler; that the £23 2s. formerly tendered was ready to be paid, on the boiler, &c., being reshipped; that they had refused the sum tendered, and refused to deliver the property unless £55 5s. was paid, which was an exorbitant sum. The latter requested the defendants to give the name of their attorney, to whom to send the process, if the matter was not immediately settled.

On the next day the defendants' attorney wrote to the plaintiffs' attorney, that the plaintiffs might, at any time, take the boiler, &c., and that the defendants would resort to an action to recover the amount due them. On the same day the action was commenced.

The above facts being shown on the trial, and it being further shown that the £28 2s. tendered was more than the defendants were entitled to, Lord Chief Justice TINDALL, before whom the case was tried, ordered a verdict for the defendants.

On a motion for a rule *nisi*, that the verdict be set aside, it was insisted, in behalf of the plaintiffs, that the refusal to restore the boiler on the demand made, amounted to a conversion, which could not be purged by any subsequent act of the parties; and that the letter written by the plaintiffs' attorney was not a waiver of the right of action vested by the conversion.

But the rule was refused, and the Lord Chief Justice, in his opinion in the case, says, "A demand and refusal are evidence only, not conclusive, of the fact of conversion. The question here is, whether the plaintiffs ought to have brought their action after the letter of the defendant's attorney;" and after recapitulating the contents of the letter, his lordship further says, "After that, it seems to me to be impossible to say that there has been any conversion. The jury could not have found any other verdict." Mr. Justice ALDERSON, in delivering his opinion, said, "A demand and refusal are only evidence of a conversion. The refusal in this case was cured by the offer subsequently made, but before the issuing of the writ, to restore the boiler."

The decision in the above case was not put on the ground that the letter from the plaintiffs' attorney was a waiver of the prior demand and refusal, and an offer then to accept the property, but on the ground that the offer to deliver the property contained in the defendants' letter avoided the effect of the prior refusal to do so.

The above case would sustain the charge in the case under consideration, were it an action of *trover*, or for the wrongful conversion of property. But this is an action to recover the

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possession of property. It has been held in several cases since the Code, that such an action can now be brought in the cases where replevin would lie, under the Revised Statutes.

It has been said that replevin in the *cepit* was a concurrent remedy with the trespass, and replevin in the *detinet* with trover. But this was never so under all circumstances. In the case of *Hanmer* agt. *Wilsey*, above cited, if, on the horse being returned by the defendant to the plaintiff's stable, the plaintiff had accepted it, no one will contend that an action of replevin could have been sustained—as the plaintiff could not have sued to recover possession of property of which he already had possession, and yet it was held that in such case trespass would lie.

The action to recover the possession of personal property is based upon a wrongful detention of it; and such wrongful detention must exist at the time of the commencement of the action.

This was substantially held in the cases of *Roberts* agt. *Randel*, (5 *Howard's Prac. Rep.* 327,) *Brockway* agt. *Burnap*, (12 *Barb. S. C. Rep.* 347,) and *Elwood* agt. *Smith*, (9 *Howard's Prac. Rep.* 528.) The case of *Brockway* agt. *Burnap* was afterwards reversed on appeal to the general term, and I think rightfully so. (16 *Barb.* 309.) The action was for the recovery of the possession of a promissory note and other property belonging to the plaintiff.

On the trial it appeared that, before the commencement of the action, the defendant had transferred the property to a third person, in payment of a debt owing by him, and the plaintiff was non-suited, on the ground that the action could not be maintained, unless, at the time of the commencement thereof, the defendant had possession of the property; and the special term denied a motion for a new trial. But, on the appeal to the general term, it was held, that the fact that, prior to the commencement of the action, the defendant had wrongfully parted with the possession, constituted no defence. Mr. Justice HAND, at the conclusion of his opinion in the case, says, "But I prefer to put it upon the broad foundation that, as a

general rule, the action will lie for any unlawful taking or detainer, although the defendant, before suit, has wrongfully parted with the possession." In this I fully concur. A person who has wrongfully delivered the property of another to a third person, may be said yet to wrongfully detain it. By permitting him to set up as a defence the fact that he had thus parted with the possession, would be allowing him to take advantage of his own wrong. But when one is ready and willing, and has offered to deliver property to the owner, it cannot be said that he wrongfully detains it. The object of the actions of trespass and trover, prior to the Code, was, and of the corresponding actions since the Code is, the recovery of pecuniary damages, and not of property in specie.

The object of this action is the recovery of the property in specie; and if, before suit brought, the defendant unconditionally offers to restore the property, the object is already attained, and the suit is wholly unnecessary. Such offer is equivalent to a tender before suit brought. It is true, that in such actions damages are recovered for the wrongful detention—but such damages are merely incidents to the action. To entitle the plaintiff to the possession of the property *pendente lite*, he is required to make an affidavit, setting forth, in the present tense, "that the property is *wrongfully* detained by the defendant." (Code, § 207.)

As suggested above, the property in this case was no longer *wrongfully* detained, after an unconditional offer to deliver it to the plaintiffs. Had they taken the property when it was offered, they yet could have recovered the damages sustained, if any, by reason of the refusal to deliver it when demanded, by an action corresponding with the former action of trover; or, as it is denominated by the Code, (§ 167,) an action for injury to property. (See *Hanmer* agt. *Wilsey*, above cited, and *Murray* agt. *Burling*, 10 Johns. 172.)

Admitting that in such an action the plaintiffs could, under the circumstances of this case, have recovered the value of the property, that is no answer to the position here taken; as the bringing of such an action would have determined their elec-

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tion to recover the value rather than the property itself—and an offer of the property would have been no answer to the action. By bringing this action, the plaintiffs have shown their election to take the property itself, and not its value; and as before suit brought the property was tendered, there was no cause for bringing it.

I think the motion for a new trial should be denied.

SUPREME COURT.

ACOME agt. THE AMERICAN MINERAL COMPANY.

In a suit against a corporation, it is not necessary to set out in the complaint, or refer to the *act* of incorporation, or mention any of its officers.

A count for goods sold and delivered is good, *it seems*, without an allegation that the sale and delivery were at the request of the defendant. The contract of sale and delivery of goods, and a delivery thereof, imply an agreement.

Each cause of action must be separately stated in a complaint.

The common counts may be contained in one count, by stating that the defendant is indebted to the plaintiff in a sum large enough to cover all that is claimed; and, in consideration thereof, promised to pay such sum; and this, though there be distinct and different considerations stated as the ground of the promise. But where there were two contracts of sale and delivery, and each transaction—as to consideration, time, quantity, price, sum of the price, and interest therein—is stated separately, but in one count; the judge refused to order judgment for the frivolousness of a demurrer thereto, for not stating each cause of action separately.

At Chambers, May 7, 1855.

The plaintiff moved, under § 247 of the Code, for an order for judgment on account of the frivolousness of the demurrer.

The complaint and demurrer thereto were as follows:—

“Supreme Court, county of Essex:—John Acome agt. The American Mineral Company,—complaint.

“The complaint of the above named plaintiff respectfully shows to this court, that the above named defendant is an incorporated company, doing business at Moriah, in said county;

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and that the plaintiff sold and delivered to the defendant the following described goods and chattels, at the times and for the prices below specified for each article; that is to say, seventy-five cords of soft wood, and seventy-five cords of hard wood—in all one hundred and fifty cords—on or about the first day of March, 1855, for the price agreed upon, of one dollar and eighty-seven and one-half cents per cord, making \$281.25; and ninety-one pieces of scantling on the 28th day of August, 1854, for the price agreed upon of nine cents apiece, amounting to \$8.19—amounting in the whole to the sum of two hundred and eighty-one dollars and forty-four cents; upon account of which, said goods and chattels, the defendant is, and remains indebted to the plaintiff in the sum of two hundred and sixty-four dollars and forty-four cents, with interest on \$8.19 from August 28, 1854, and on \$256.25 from March 1, 1855—for which sum and interest, with costs of this action, plaintiff demands judgment.

“J. F. HAVENS, *Plffs. Att.*”

“*Supreme Court:—John Acome agt. The American Mineral Company. Demurrer to Complaint.*”

“The defendant demurs to the complaint of the plaintiff in this action for the following causes, to wit:—

“1st. It is not alleged that the defendant, named as ‘The American Mineral Company,’ is a corporate body.

“2d. It does not allege that the defendants are a corporation created by the laws of this state.

“3d. It does not appear whether the defendant is a body corporate, private company, or an individual.

“4th. It does not set forth the name of the defendant, or any officers of a corporation, nor is the defendant named in the complaint.

“5th. It does not recite the title of the act incorporating said company, nor the date of the incorporation.

“6th. In the complaint are two several causes of action, and they are not separately stated and numbered.

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"7th. That several causes of action have been improperly united.

"8th. That the complaint does not state facts sufficient to constitute a cause of action.

"9th. That the contract, or agreement, set forth in the complaint is void for uncertainty.

"J. P. BUTLERS, *Defts. Att.*"

POND & HAND; *for motion.*

O. KELLOG, *opposed.*

HAND, J. The complaint alleges that the "defendant is an incorporated company, doing business at Moriah," &c. The demurrer admits the truth of this allegation; and if it did not, it was not necessary for the plaintiffs to set out the act of incorporation. (*Stoddard agt. Onondaga Ann. Conf.*, 12 *Barb.* 573.) Nor are we to intend, as a matter of law, that this company is a foreign corporation, especially as it is stated that it is doing business within this state.

It is said, that a corporation, under the general law of 1848, (*Laws of 1848, chap. 40.*) should be sued with the addition of the officers, as "President, directors," &c. But it does not appear that this company was formed under that law; and if it was, that act does not prohibit the adoption and use of a corporate name, like that by which the defendants are sued in this case. (§ 2; and see *Ang. and A. on Corp.* 79, and *chap. 18.*) We are not to presume, on demurrer, that this is a wrong name.

The complaint does not allege that the goods and chattels were sold and delivered at the special instance and request of the defendant; and one ground of demurrer is, that it does not state facts sufficient to constitute a cause of action. But when the sale is stated to have been made directly to the defendant, the words "sold and delivered" would seem to imply a contract between the parties. (See *Emery agt. Fell*, 2 *T. R.* 28; *BULLER, J.*; *Brown agt. Garnier*, 6 *Taunt.* 389; 2 *Chit. Pl.* 55, *n. o.*; 1 *M. & Gr.* 266, *n. b.*; *Berry & Lernaïndes*,

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1 *Bing*. 338; 1 *Saund. R.* 264, *a. n. a.*; *Allen* agt. *Patterson*, 3 *Seld.* 479.) And if so, it can hardly be necessary to allege that the goods were sold and delivered at the request of the defendant. (*Id.*)

I am aware that this has been doubted; and in some editions Mr. Chitty adds, "*sed quære.* (2 *Chit. Pl.* 55, *n.o.*, 5th *Am. ed.*; *Dumford* agt. *Messiter*, 5 *M. & Sel.* 446.) And there was a request by the defendant in *Allen* agt. *Patterson*, (3 *Seld.* 476.) But where there is a contract for the sale and delivery of goods to the defendant, into which both parties, of course, must have voluntarily entered, and which has been so far executed that the defendant has received the goods, it is not very apparent how it can be necessary to allege that such contract was made at the request of the defendant. I am inclined to think such allegation is not necessary in a count for goods sold and delivered; though it may be prudent to insert it.

But the objection that several causes of action have been improperly united in one count, seems to be well taken. (*Code*, §§ 144, 167; *Benedict* agt. *Seymour*, 6 *Howard's Pr. R.* 298.) There is at least too much doubt to grant this motion. The common counts may, in fact, be contained in one count, by stating that the defendant was indebted in a sum large enough to cover all the sums the plaintiff claims to recover; if it be further alleged that, in consideration of such indebtedness, the defendant promised to pay such sum. All may be put into one count, though there be distinct and different considerations, if the indebtedness in one sum, and one promise, be alleged. (*Bailey* agt. *Freeman*, 4 *John. R.* 280; *Nelson* agt. *Swan*, 13 *id.* 483; *Rooke* agt. *Rooke*, *Cr. Jac.* 245; *Morse* agt. *Morse*, 11 *M. & W.* 831; 2 *Saund. R.* 122, *c. n. 2 & b.*; 1 *Chit. Pl.* 301.)

In the case now under consideration, the pleader intended there should be but one count, and that sets out the sale and delivery of so much wood on the first of March, 1855, at a fixed price, and amounting to a fixed sum; and also the sale and delivery of so many pieces of lumber on the 28th of August, 1854, at a fixed price and sum; and interest is claimed on one, and on part of the other of said sums, from different

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dates; and there is a further allegation that, "on account of said goods and chattels, the defendant is, and remains, indebted" in a sum considerably less than the aggregate amount. But no promise to pay that or any other sum is stated. There was not in *Allen agt. Patterson, supra*; but in that case there was but one sale and delivery.

Here the whole claim, it is true, is for goods and chattels sold and delivered; but there were two contracts of sale; and each transaction—as to consideration, time, quantity, price, sum of the price and interest thereon—is stated separately, but yet in one count, (*Jourdain agt. Johnson, 2 Cr. M. & R. 564*;) *Galway agt. Rose, (6 M. & W. 291,)* goes a great way; but in that case, and also in *Bailey agt. Freeman*, and *Moss agt. James*, above cited, and in *Webber agt. Twill, (2 Saund. R. 121, a,)* there was a promise to pay; and no doubt there was in *Nelson agt. Swan, (supra. And see 2 Saund. R. 121, c note 2 & b.)* No promise was alleged in *Allen agt. Patterson*, but this point did not arise.

At any rate, if there should be no amendment of the complaint, this question had better be disposed of by a direct adjudication upon the demurrer; which is a much better way of trying the validity of pleadings, where there is any room for doubt, than by an application to a judge for judgment because of frivolousness. It should be a strong case to authorize an interference in this summary manner. (*Van Santf. Pl. 433; Gra. Pr. 759; 1 Whitt. Pr. 468.*)

Motion denied.

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SUPREME COURT.

JOHN C. HAMMOND and others agt. THE HUDSON RIVER IRON
AND MACHINE COMPANY and others.

If the provisions of section 292 of the Code, in relation to supplementary proceedings, can, under any circumstances, be construed to apply to *corporations*, (which is doubted,) they cannot embrace those which are *insolvent*.

The provisions of the Revised Statutes (2 R. S., 463,) are preserved by § 471 of the Code, and must govern proceedings supplementary to execution, against insolvent corporations. (*This agrees with Hinds agt. The Canandaigua & Niagara Falls R. R. Co., ante, p. 457.*)

Therefore, *held*, that where a judgment creditor had proceeded under § 292 of the Code, against an insolvent corporation, to the appointment of a receiver, &c., that he was not thereby entitled to a preference over the other creditors of the corporation; and that he, with all the other creditors, must be subject to the provisions of the several sections of the Revised Statutes, *supra*.

And on petition and motion, on behalf of other creditors of the corporation, to set aside such proceedings, and for general equitable relief for the benefit of all its creditors, and for the appointment of a receiver, &c., *held*, that all other suits and proceedings instituted under § 292 of the Code, and otherwise, for the benefit of particular judgment creditors, must be stayed until the determination of the present action, instituted under the provisions of the Revised Statutes for the benefit of all the creditors.

There seeming to be no objection to the receiver already appointed, in the proceedings under § 292 of the Code, his appointment was continued under the subsequent action.

Washington Special Term, Sept., 1854.

THIS is a motion for the appointment of a receiver, and for other relief, as specified in the notice.

The petition of the plaintiffs states that plaintiffs, on the 26th of June, 1854, obtained a judgment in the supreme court of this state, against the defendants, for \$10,671.48 damages and costs, upon which execution was issued to the sheriff of Washington county, (the defendants' place of business having been in Fort Edward, in said county,) and has been returned wholly unsatisfied. That after the return of the execution,

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and on 29th July, 1854, plaintiffs commenced an action against all the defendants, who have all appeared, but no answer has been put in. That the company entirely stopped business in May last; that before stopping, and previous to January, 1854, the company had become insolvent, and had ceased to pay anything towards its debts before stopping business. That the amount of the indebtedness of the company, according to a statement furnished by it in June, 1854, was between \$90,000 and \$100,000; and that its debts, at that time, and in January, 1854, amounted, at least, to \$70,000; and that its property was not sufficient, at those times, to pay one half the amount of its debts. That its property was all personal and tangible, and has been sold on execution or executions, and on judgments belonging to defendant Beach; except a contract for the sale of certain real estate; and that it is now possessed of no property except from its debts due, and from which may be realized \$3,000, and except its interest in said real estate and water power, upon which it has heretofore carried on business, and which it purchased or agreed to purchase from the Fort Edward Manufacturing Company, and which is now held by said defendant, said company, by contract from said other company. That the original purchase money for said real estate and water power, was \$13,000, upon which there is now due the sum of \$7,000 or thereabouts. That the defendant, the company, has made valuable erections and improvements upon said property, and their interest therein is now worth \$10,000. That defendant, Beach, claims to own and hold a judgment against the defendant, the company, for \$1,025.31, obtained on the 18th of July, 1854, upon which an execution has been issued to the sheriff of Washington county, and returned unsatisfied; and said Beach, since the return of said execution, has commenced an action in the supreme court of this state, against the defendant, the company, and the Fort Edward Manufacturing Company, for the satisfaction of said judgment out of the interest of the defendant therein, in the contract for the real estate aforesaid; and that its interest may be sold or transferred to him, (Beach) upon such terms as the court shall deem just; and,

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also, for a specific performance of said contract. That said Beach claims to be the assignee and owner of another judgment obtained by one Harry Chapman against the defendant, the company, on the 26th day of July, 1854, for \$3,331.05, and upon which proceedings supplementary to execution have been instituted by Beach against said company, and Hazen W. Bennett appointed receiver; that said Beach claims the exclusive benefit of said proceedings, and that said judgment, so assigned, be first paid by the receiver from the assets of the company which may come to his hands. That said receiver claims the exclusive right and control over the remaining property and assets of the company, as such receiver, for the exclusive benefit of said judgment, so far as may be necessary for its payment.

That the defendant, the company, is a manufacturing corporation, organized under the act of 1811, and the several acts amending and continuing the same, and was insolvent on the 28th and 30th days of January, 1854. That the company have interposed no defence to the suits or proceedings of defendant, Beach, who is in possession of said real estate, and that the company are colluding with him to give him a preference over their other creditors.

The complaint charges that defendants, Beach and Mears, claim and pretend that they have paid a large amount for said company, as endorsers, and are liable for a still larger amount, in all to at least \$25,000; and that they took a mortgage from said company on the 30th of January, 1854, to cover said amount of \$25,000, covering all the estate real and personal of the company; and that they have possessed themselves of all the personal property and assets of the company, and have disposed of the same, or of a large amount thereof, to pay their said liabilities. That said transfer or mortgage was fraudulent, and that said company had, previous to said 30th January, 1854, refused payment of all or some of its notes and debts; that said mortgage was not filed till 25th of May, 1854, at which time the company had stopped payment. That said Beach and Mears had sustained no losses when they sold the property un-

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der said mortgage, nor was the company indebted to them for money borrowed; that a judgment was obtained by Beach a few days afterwards, for all indebtedness, and satisfied by a sale upon execution, and that said judgment was fraudulently obtained. That the amount of the capital stock of the company was \$13,000, and that Beach and Mears were original, and still are, stockholders in said company.

The defendants, in their affidavits, deny all fraud, and aver that their liabilities for the company amount to \$29,000; that the mortgage was given to secure them against loss. That the judgments which Beach obtained, and now owns and claims, were honestly and fairly obtained for honest and fair debts—and proceedings supplementary to execution, regularly instituted under the Code—and the receiver gave the required bond, and has entered upon the duties of his office. That the amount in his hands will not be sufficient to pay the amount of the first judgment. That the action commenced against the defendant, the company, and the Fort Edward Manufacturing Company, to obtain satisfaction of the judgments mentioned in the complaint, were regularly commenced on and previous to the 22d of July, 1854, and no answer has been received in either of them.

ROMEYN & TABOR, *for plaintiffs.*

A. D. WAIT, *for defendants.*

C. L. ALLEN, Justice.—The relief asked for in the notice of motion is various. The first prayer is for the appointment of a receiver, in this action, of the property and effects of the Hudson River Iron and Machine Company, for the benefit of all the creditors of said company, in proportion to their debts respectively, pursuant to the complaint and petition. In considering the motion, I shall lay out of view entirely the charge of fraud, so far as defendants, Beach and Mears, are concerned. That is a matter not to be tried on affidavit or on this motion, but on the trial, if any is hereafter had.

The important question that presents itself for consideration

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is, whether a corporation can be proceeded against, like an individual debtor, under § 292 of the Code?

That section does not speak of corporations, but only of the judgment debtor; and § 294, for the first time, names corporations, and provides that a judge, in certain cases, may make an order requiring such corporation or member thereof, to appear at a specified time and place, and answer concerning any property which may be in the hands of such corporation belonging to the judgment debtor. It would seem, from the entire silence of § 292, that corporations were not intended to be included within its provisions; and were it not for the general section of a statute, enacting that wherever the term "*person*" was used in the Revised Statutes, it should be held to include corporations as well as individuals, and from the remarks of the CHANCELLOR in *Morgan agt. The New-York & Albany Railroad Company*, (10 Paige, 290,) I should be inclined to come to that conclusion. But conceding that the section would, under certain circumstances, and might be construed to include corporations, I am of opinion that it does not embrace those which are insolvent.

It has been well remarked that § 292 was a substitute for the old creditors' bill; and in the case just cited, it was held, that a judgment creditor who filed a bill to obtain his debt out of the property and effects of the corporation, after the return of an execution unsatisfied, must proceed, according to the provisions of the Revised Statutes relative to proceedings against corporations, in equity.

The 36th section of that act (2 R. S., 463; 4th ed., 705, § 44,) declares that "Whenever a judgment at law or a decree in equity shall be obtained against any corporation incorporated under the laws of this state, and an execution issued thereon shall have been returned unsatisfied in part or in the whole, upon the petition of the person obtaining such judgment or decree, or his representatives, the supreme court may sequester the stock, property, things in action and effects of such corporation, and may appoint a receiver of the same."

The next section declares, that upon a final decree on any

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such petition, the court shall cause a just and fair distribution of the property of such corporation; and of the proceeds thereof, to be made among the fair and honest creditors of such corporation, in proportion to their debts respectively, who shall be paid in the same order as provided in the case of a voluntary dissolution of a corporation. Section 38 enacts, that whenever any incorporated company shall have remained insolvent for one whole year, or for one year shall have failed and neglected to pay and discharge its notes, it shall be deemed to have surrendered its rights and privileges, and shall be adjudged to be dissolved.

The defendant, Beach, swears that to his knowledge and belief, the company was not insolvent on the 28th of January last, but admits that it was so insolvent on the 26th of May last; but he does not deny, nor does Mears, the allegations in the complaint and petition, that the company had, previous to the 30th day of January, 1854, refused payment of all, or some of its notes. Besides, it appears from the papers, on both sides, that the defendant Beach's execution was returned unsatisfied, and that his case comes wholly within the provisions of section 36. These sections are not repealed by the Code, nor are they inconsistent with it. Indeed, section 471 seems to have been intended to preserve them entire, and to exempt proceedings as against corporations from its operation; and the case of *Dambman agt. The Empire Mills and others*, (12 Barb., 341,) intimates the same doctrine. I think, therefore, that the proceedings of defendant, Beach, under section 292, do not entitle him to a preference over the other creditors of the corporation; and that he, with all the other creditors, must be subject to the provisions of the several sections above recited. It is contended by defendants, that if Beach obtained no preference by the supplementary proceedings, that relief cannot be granted by this motion, but that the remedy was by appeal. These proceedings were *ex parte* by the judgment creditor. Plaintiffs were not a party to them, and had no opportunity of appealing; and, I think, can avail themselves of this remedy.

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2. Another claim for relief is founded upon the position taken by the plaintiffs' counsel, that the defendant, Beach, cannot acquire the interest of an insolvent corporation, to a right by contract, in real estate, under the provisions, 1 *R. S.*, p. 744, §§ 4, 5, 6, any more than he can obtain a preference under section 292. If the former position is correct, that the proceedings must be regulated by the provisions of the statute before recited, it would seem to follow that this view is tenable. At all events, for the purposes of this motion, I will hold it to be so, reserving my final opinion for a future state of the cause. (*See 10 Paige*, 290 ; 15 *Barb.*, 62 ; 6 *Paige*, 482.)

I think, however, that under section 122, the plaintiffs might apply to be made parties to Beach's suit, to recover the real estate. But as the rights of all can be protected under the present action, I think it most advisable that all other suits be stayed, until the determination of the present one ; and, if necessary, a notice must be published requiring all the creditors to exhibit their claims, and become parties to the suit within the time required by section 56. (2 *R. S.*, 466 ; 4th ed., 708, § 64.)

As to the appointment of receiver, I perceive no good objection to retaining Mr. Bennett. He appears to be in no wise connected with the company, and is shown to be a proper and suitable person. Besides he has proceeded so far in the execution of the duties of that office, as to have probably made himself well acquainted with the affairs of the company, and will thus be able to discharge the trust in a manner more beneficial to the creditors, than a stranger. As it is probable that the undertaking which he has executed, will not be valid and binding under the present proceedings and appointment—he must renew his undertaking within 20 days, and file it with the clerk of this court in Washington county—and he is to retain in his hands, or invest as the court shall hereafter direct, all moneys and assets, and property which he has received or shall hereafter receive, belonging to the company, and is not to pay over any money to any person, except by the order of the court—

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but is to be at liberty to apply for instructions to the court, from time to time, as he shall be advised.

The defendant Beach is to be, in the meantime, restrained from prosecuting either of his actions commenced against the defendant, the company, and the Fort Edward Manufacturing Company; and, also, from any further action under his supplementary proceedings, until the further order of the court—and the plaintiffs are to be at liberty to amend their complaint, by making the receiver, and such other persons, parties, as they may deem advisable. Ten dollars costs of this motion to abide the event of the action.

Order accordingly.

SUPREME COURT

ANDREW WHITE, receiver of the Canal Bank of Albany, agt.
MILES and LEWIS JOY.

A complaint, upon a promissory note, entitled "Andrew White, receiver of the Canal Bank of Albany," alleging throughout indebtedness thereon to, and ownership by, plaintiff, and demanding judgment in favor of the plaintiff, is insufficient to recover in the capacity of *receiver*. The words, "Receiver of the Canal Bank of Albany," are merely *descriptio personæ*; and the law adjudges that he sues in his individual capacity.

To recover as receiver, it would be necessary to allege, in legal form, that the plaintiff was appointed receiver of the property and effects of the bank. The time, place, and manner of the appointment, are traversable facts, and should be stated. (*This agrees with Sheldon, adm'r, agt. Hoy, ante, page 11.*)

The Code says, (§ 155,) "If the reply of the plaintiff to any defence set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof." Here the broad ground is afforded to the defendant to demur to the reply, *whenever it is insufficient*, without pointing out on what particular grounds the reply shall be deemed insufficient.

Where a plaintiff, in his *complaint*, claims to recover as an *individual*, upon which the defendant, in his answer, takes issue, he has no right, in his *reply*, to assume and claim in an *official capacity*.

The Code does not authorize a plaintiff to recover upon facts set forth in his *reply only*, which are not mentioned, or referred to in his *complaint*.

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Albany General Term, April, 1855.

THE defendants were summoned to answer the complaint of Andrew White, of the Canal Bank of Albany, as plaintiff, and if they failed to answer, judgment would be taken against them for \$1,000, with interest from the 27th of October, 1849.

The complaint, which was served with the summons, was entitled, "*Andrew White*, receiver of the Canal Bank of Albany, agt. *Miles and Lewis Joy*," and set forth that the defendants, as partners, on the 27th day of October, 1848, at Buffalo, by a promissory note in writing, promised to pay the sum of \$1,000 one year from date; that the same was transferred to the plaintiff, who is now the holder and owner thereof; that payment was demanded at maturity; that the defendants had not paid it, but were indebted to the plaintiff therefor; whereupon the plaintiff demands judgment against the defendants for \$1,000, with interest from the 27th day of October, 1849.

Lewis Joy, one of the defendants, put in an answer, denying that he was indebted to the said Andrew White in any sum whatever upon the note mentioned in the complaint, or that the note was ever transferred to the said White personally; and controverted the allegation in the complaint, that White was the holder and owner of it. For a further answer, and by way of new matter, he admitted that Miles Joy (his co-defendant) and himself, previous to, and at the time of the failure of the Canal Bank, were indebted to the said bank in an account larger than the note. That on the 10th of July, 1848, the bank stopped payment, and became insolvent; that shortly thereafter, and before the giving of said note, in August of that year, he was informed, and believed, that a receiver of the property of the bank was appointed in pursuance of the statute and the manner provided by law; that the receiver entered on his duties, and took possession of the property of the bank, including the demand against the defendant and Miles Joy; and that subsequent to taking such possession, the said Miles Joy and defendant made the said promissory note, and caused the same to be transferred and delivered to the said receiver of the bank, in payment of their prior indebtedness. He then averred that the

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said receiver of the Canal Bank was, in his official character and capacity as such receiver, the owner and holder of the promissory note mentioned in the complaint; and insisted that the said Andrew White was not entitled to recover against the defendant any judgment whatsoever, by reason of anything alleged in the said complaint.

The plaintiff replied, that on or about the 17th day of July, 1848, he was, by an order of the supreme court, made pursuant to statute, on occasion of the insolvency of the said Canal Bank of Albany, appointed receiver of the property, effects, and things in action of said bank; that he was the receiver mentioned, and whose appointment was set forth in the answer; and that he was now the holder and owner of said note as such receiver, and seeks to recover in this action in that capacity, and not individually.

To this reply Lewis Joy demurred, and assigned the following causes:—

1st. That the said reply does not correspond with the summons in this action, in this: that said plaintiff, in said summons, describes himself as "Andrew White, of the Canal Bank of Albany," and gives notice, in said summons, that in case of the failure of the defendants to answer the complaint in this action, he will take judgment against them; and in and by his said reply he seeks to recover the same judgment, in his therein first alleged capacity of receiver of the Canal Bank of Albany, and not individually, as by his said summons he claims to do.

2d. That said reply shows that the plaintiff is not entitled to recover, by reason of the fact stated in the complaint.

3d. That the plaintiff, by his said reply, seeks to avoid the effect of the defendant's answer, and at the same time, by means of the last pleading (save a demurrer) allowed by law in an action, to deprive this defendant of stating and pleading all or any of the defences which he has, or may have, to any action which may be brought by the receiver of the Canal Bank of Albany, or of any assignee, after maturity of the promissory note mentioned in the complaint, for the recovery, by the said receiver, in his capacity of receiver, or by such assignee, after

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maturity, of the amount claimed to be due upon said promissory note.

4th. That by said reply the plaintiff has abandoned and deserted the grounds taken by him in his complaint, and upon which he therein sought to recover, and resorts to other grounds of recovery.

5th. That by said reply the plaintiff seeks to recover in a different character from that in which he seeks to recover in his complaint.

6th. That the reply is a departure from the complaint, and is a departure from the grounds and cause of action set forth in the complaint.

7th. That the said reply is in other respects defective, insufficient, and informal.

The demurrer was brought to argument before Justice WRIGHT, who gave judgment for the defendants thereon, and the plaintiff appealed to this court.

LANSING & PRUYN, *for appellant.*

WELCH & HIBBARD, *for respondents.*

By the court—WATSON, Justice. The first and most important question arising upon the pleadings is, in what capacity did the plaintiff sue? In the summons he describes himself as "Andrew White of the Canal Bank of Albany, plaintiff," and gives notice that if the defendants fail to answer the complaint, that, as *such plaintiff*, he will take judgment against them. So far as the summons goes, he clearly sues as an individual, for he does not represent himself to be even an officer of that bank. But, passing by the summons, and taking up the complaint, does the plaintiff appear in any other light? It is true, the complaint is entitled, "Andrew White, receiver of the Canal Bank of Albany;" but how he acquired that fiduciary capacity, by the order of what court, at what time, or at what place, it is nowhere set forth in the complaint. Without setting forth these essential requisites, the law adjudges that he sues in his individual capacity, and that the words, "Receiver of the Canal

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Bank," are merely descriptive of the person. (*Ex parte The Bank of Monroe*, 7 Hill, 177; 3 Comstock, 44 & 46; *Stone agt. Wood*, 7 Cowen, 453; 8 *id.* 81.)

It was necessary to allege, in legal form, that the plaintiff was appointed receiver of the property and effects of the bank. The time, place, and manner of the appointment are traversable facts, and should be stated. (4 Denio, 80; 2 Barb. S. C. R. 369; 17 Wend. 198; *Story's Eqt. Ple.* 38, 257, 258, and 260.) The corporation being dead, the receiver's right to administer upon its estate or effects is a material and traversable fact; and if the decree of the court appointing him had been set out, or the substance of it, the court could have determined, after the defendant had had an opportunity of traversing the facts set forth, whether the plaintiff, as a receiver, had a right to recover on the note. Upon this point the complaint is entirely silent. The plaintiff's complaint, therefore, is wholly defective, in not showing any facts that entitle him, in the capacity of receiver, to recover upon the note, or even to show that he is the holder and owner, as such receiver.

The Code, which is always referred to as authority to support a loose or defective pleading, will not sustain the complaint in this case. That requires "a plain and concise statement of the facts constituting a cause of action, without any unnecessary repetition." (*Code*, § 142, *sub.* 3.) Here the facts set forth in the complaint do not constitute a cause of action, and do not entitle the plaintiff to recover in the capacity in which he seeks to recover.

The plaintiff insists that there is no such ground of demurrer allowed by the Code as is here taken by the defendant. If the reply of the plaintiff, to any defence set up by the answer of the defendant, be insufficient, the defendant may demur thereto, and shall state the grounds thereof. (*Code*, § 155.) Here the broad ground is afforded to the defendant to demur to the reply *wherever it is insufficient*, without pointing out on what particular grounds the reply shall be deemed insufficient. It must be tested by the same rules which are applied to other pleadings.

What is the reply in this case to that part of the defendant's

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answer, which sets forth that a receiver had been appointed upon the property and effects of the Canal Bank, and that the defendant and his co-defendant were indebted to the receiver, in his capacity as *receiver*, to the amount of the note, and not the plaintiff individually? His reply is, that by an order of the supreme court, he had been appointed receiver of the said bank, and that, as such receiver, and not individually, he claimed to recover of the defendants the amount of the said note. Here is a total departure from the complaint. There, as I have shown, he claimed to recover individually of the defendants. Here he claims to recover in the capacity of a receiver, duly appointed to administer upon the effects of a defunct corporation.

These rights are entirely distinct, and depend upon entirely different facts. The defendant had joined an issue upon the plaintiff's right to recover in his individual capacity, by denying, in the first part of his answer, every material fact in the complaint constituting a right on the part of the plaintiff to recover in that character. In the second part of his answer he sets forth facts, which show that another person, to wit, the receiver of the Canal Bank, had a right to recover upon the said note, and not the plaintiff individually. The plaintiff, in his reply, abandons entirely the only grounds on which he claimed to recover in his complaint, and assumes a wholly different character—that of a receiver of an insolvent corporation, appointed by an order of the supreme court, and claiming, in that character, to recover upon the note. Now, unless the Code authorizes a plaintiff to recover upon facts set forth in his reply *only*, which are not mentioned or referred to in his complaint, then the plaintiff cannot recover in this case. The plaintiff has no cause to complain, if the rules of law applicable to pleadings are strictly and rigidly enforced against him in this case. His position is one which he voluntarily chose. When the answer of the defendant distinctly apprised him of the difficulty in the way of his recovery, he might have amended his complaint by setting forth facts sufficient to show his right to recover as receiver of the bank; or if his complaint was not amendable,

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then he could have discontinued his suit. Instead of doing either, he has chosen to interpose a reply to the defendant's answer, which reply is wholly insufficient; and the defendants should have judgment upon demurrer, with leave to the plaintiff to amend on payment of costs.

SUPREME COURT.

BENJAMIN ECKERSON and another agt. GOTTFRIED VOLLMER,
JOHN A. VOLLMER and MAGDALENA, his wife.

In an action relating to real estate, against husband and wife, where process is served only on the *husband*, he is bound, except where the estate is the *separate property of the wife*, to enter a *joint appearance* and put in a *joint answer* for himself and wife.

An inchoate right of *dower* is an interest which results from the marital relation, and does not belong to the wife as her separate estate.

Kings Special Term, March, 1855.

THIS action was brought to set aside a conveyance of certain real estate alleged to have been made by John P., and Samuel Fowler, to the defendant, John A. Vollmer, with intent to defraud the plaintiffs and other creditors of Gottfried Vollmer. The summons was served on John A. Vollmer, but not on his wife. The action was tried before a referee, and judgment was entered upon his report, setting aside the conveyance, and directing the defendants, John A. Vollmer and wife, to execute a deed of the premises to a receiver.

The defendant, Magdalena, now moves to vacate the answer and all subsequent proceedings, so far as the same affect her, and that she may be allowed to put in an answer to the complaint and defend it, for the reason that she was not served with process, and that no appearance or defence has been put in for her by any person authorized by her.

Eckerson and another agt Vollmer, &c.

G. A. SHUFELDT, *for plaintiffs.*J. W. GILBERT, *for defendant, Magdalena Vollmer.*

ROCKWELL, Justice.—There is no foundation for this motion. In an action against husband and wife, service of process on the wife, is only necessary where the proceeding is against her in respect to her separate estate, in which case the husband is only a nominal party. In other cases, the husband, upon being served, is bound to enter a joint appearance and put in a joint answer for himself and wife. (*Leavitt agt. Cruger*, 1 *Paige*, 421 ; 3 *Chitty's Gen. Pr.*, 263.)

In this case, neither husband nor wife could have answered separately without being authorized to do so by the order of the court, and no reason has been shown why the wife should have been allowed to put in a separate answer. The only interest which she had in the premises affected by the judgment, was her inchoate right of dower. This kind of interest results from the marital relation, and does not belong to the wife as her separate estate. The wife is deemed, in law, to be under the protection, as well as under the power of her husband. It was his duty, in this case, to have put in a suitable defence for his wife, and he is presumed to have done so until the contrary is shown. Indeed, if he had successfully defended himself, such defence would necessarily have enured to the benefit of his wife. All of her interest in the premises was a mere incident to his. It is not shown that she now proposes to put in a defence upon any different ground from that upon which the action has already been defended.

Motion denied.

Brahe agt. The Pythagoras Association, and four others.

SUPERIOR COURT.

BRAHE agt. THE PYTHAGORAS ASSOCIATION, and four others.

The superior court of the city of New-York, has no jurisdiction of an action to dissolve a corporation created by the laws of the state of New-York, and distribute its effects among its creditors through a receiver, or to inquire into the validity of its proceedings to elect its officers, or to restore one unlawfully displaced.

Under *sub.* 3 of § 33 of the Code, it has jurisdiction of only those actions in which the corporation is to be proceeded against, and dealt with throughout, as a *subsisting corporation*.

April Special Term, 1855.

THIS case came before the court on a demurrer to the complaint. The Pythagoras Association is a corporation under *chapter 319 of the Laws of 1848*. The complaint stated the objects and articles of the association, (which articles provided that the contributions made by a member should be refunded to him on being expelled,) what the plaintiff had contributed, his unlawful expulsion, and his right to demand and be paid the sum of \$500; that the other defendants improperly managed to procure themselves to be elected trustees—and others to be removed; and also set forth other acts, which, it was claimed, were sufficient to justify a decree dissolving the corporation, and directing its effects to be sold and distributed; and prayed such relief, the payment of the \$500, the appointment of a receiver, the removal of the defendants (other than the corporation) from the offices to which they had been elected, and other relief.

The demurrer to the complaint assigned for cause, that several causes of action were improperly united; that the court had no jurisdiction of any of the causes of action, except to recover of the corporation the \$500; and that, to such an action, the corporation was the only necessary or proper party defendant.

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H. S. DODGE, *for defendants.*

A. L. ROBERTSON, *for plaintiff.*

BOSWORTH, Justice.—Unless this court has jurisdiction of an action or proceeding to dissolve a corporation created by the laws of this state, and distribute its effects among its creditors, through a receiver, or to inquire into the validity of its proceedings to elect its officers, and to restore one unlawfully displaced, there is a misjoinder of causes of action and of parties.

To an action against a corporation, to recover of it a mere money demand, its officers are neither necessary nor proper parties.

It is not pretended that this court, prior to the Code, had jurisdiction of any visitatorial powers over a corporation, or of any proceedings instituted to obtain a decree dissolving it, and distributing its effects. Such powers could only be exercised by, and such proceedings could be had only in, the court of chancery. (2 R. S., 462 to 472.)

Under the present constitution and the judiciary acts of 1847, the supreme court was vested with the general powers and jurisdiction previously possessed and exercised by the court of chancery. There is no law conferring any such jurisdiction and powers upon this court, unless they are granted by sub. 3 of § 33 of the Code. Reading that so as to make its terms confer the most extensive jurisdiction which they are capable of granting, it gives this court jurisdiction of *all actions* against a domestic corporation, “upon any cause of action arising therein ;” that is, in this state.

These terms are not more comprehensive than those of section 427, which declares, that an action against a foreign corporation may be brought in this court, “by a resident of this state, for any cause of action.”

I think section 33 includes only such actions as are or may be brought to enforce or protect some right, or redress or prevent some wrong ; and as are brought in only those cases in

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which the corporation is to be proceeded against, and dealt with throughout, as a *subsisting corporation*.

If these views are correct, the only cause of action stated in the complaint, on which the plaintiff can have relief in this court, is the one on which he bases his claim to recover from the corporation the sum of \$500. To an action upon such a cause of action, the corporation is the only proper party. I think the demurrer is well taken. The plaintiff may amend his complaint on payment of costs.

SUPREME COURT.

LEWIS HERGMAN & ADOLPH ALEXANDER agt. MORITY DETTLEBACH and others.

On a *fi fa.* against one of several *partners*, the co-partnership property may be seized, and the interest of the judgment debtor in the same sold by the sheriff; but subject to an accounting among the partners, on dissolution. And it *seems*, that the same principle must apply to the case of an *attachment* under the Revised Statutes.

Where the sheriff, by virtue of an attachment, seizes and takes the partnership books and papers of a party, his power is limited to *take* them only; and having taken them, he is required to *safely keep them*.

Where a deputy sheriff, after taking possession, assumed to examine such books and papers, take copies of the business letters, look into the correspondence of the partners, &c., *held*, that he was guilty of a gross abuse of his powers, and of the process of the court. He usurped the exercise of a discretion which belonged to the judge alone.

Letters and *correspondence* are not among the papers which the statute authorizes to be *taken* under process.

New-York Special Term, April, 1855.

MOTION that the books and papers taken under attachment from possession of the defendants, Epstein and Horig, on the attachment against Dettlebach, as a non-resident, under 2 R.

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S., p. 3, be restored to the possession of the defendants from whom taken.

WM. M. EVARTS, *for motion.*

A. F. SMITH, *opposed.*

COWLES, Justice.—It seems to be well settled that on *fi. fa.* against one of several partners, the co-partnership property may be seized, and the interest of the judgment debtor in same sold by the sheriff; but subject to an accounting among the partners, on dissolution. (*Phillips* agt. *Cook*, 24 *Wend.*, 387; *Waddell* agt. *Cook*, 2 *Hill*, 47; *Walsh* agt. *Adams*, 3 *Denio*, 125.) And I see no reason why the same principle does not apply to the case of an attachment under the Revised Statutes. If so, the sheriff, under the warrant, had a right to take the co-partnership books, &c.

But the power of the sheriff, under the attachment, is limited to the right to *take* them only; and having taken, he was required to *safely keep them*. (2 *R. S.*, 3, § 7.)

The sheriff had no power or authority beyond that, except as directed by the officer who granted the warrant. (*Vide*, § 8.)

When, therefore, the deputy sheriff assumed to examine such books and papers, take copies of the business letters, look into the correspondence of the partners, or do any other act in relation to them, than simply to *keep them safely*, subject to the direction of the judge who allowed the process, he was guilty of an unpardonable abuse of his powers, and of the process of the court.

It was usurping the exercise of a discretion which the statute reserved to the judge alone, and reserved to him, too, for reasons of the most obvious character. To tolerate such a proceeding would lead to the most gross abuses, and enable the process of attachment to be used for inquisitorial purposes, which, in its consequences, would be in derogation of the spirit of the Bill of Rights.

It is evident, also, from the affidavits, that many papers, not

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contemplated by the statute, have been seized in this proceeding under color of the attachment.

The statute provides that certain books and papers may be taken into possession under the process. (*Vide*, §§ 7, 8.)

Letters and correspondence are not among those authorized to be taken.

As the whole proceeding on the part of the deputy, in examining the books and papers, is grossly irregular, an order must be made, that the regular books of account of the firm, and its notes, policies of insurance, and all other securities and vouchers, be safely kept by the deputy sheriff, under lock and key, without power on the part of such deputy, or any other person, except the defendants, to look into or examine the same, except under the special order of the court, to be made on notice to the defendants.

The defendants and their counsel to be at liberty, at all reasonable hours, to examine, or take copies or abstracts from them, in the presence of the deputy.

All other papers, of every name and description, taken by such deputy, and all translations, or copies of such translations, if any, of the books, letters, vouchers or papers, must be delivered up forthwith to the defendants' attorneys; and, to insure the same, such delivery must be made under an affidavit—to be made by such deputy, by the plaintiffs, and their attorneys and counsel—that, at the time of such delivery, such copies embrace every translation, or copy of such translation, or copy of such original which the deponent knows of, or believes, or has any reason to believe, exists; and the plaintiffs and their attorneys, agents and counsellors, are hereby restrained from in any way using such original books and papers, or using or disclosing the contents of such copies in any manner whatsoever, except by special order of the court.

This order must be complied with forthwith, and is to be entered with costs of motion.

SUPERIOR COURT.

JAMES J. WOOLSEY agt. OWEN B. JUDD, WILLIAM B. MCKAY,
THOMAS HOLMAN, GEORGE W. GRAY and HENRY WILBUR.

It is doubtful whether the courts of the United States, under the act of congress amending the several acts respecting copyrights, passed February 3, 1831, have power to restrain, by injunction, the publication of private letters contrary to the wishes of the writer.

The jurisdiction, however, which, under the act of congress, the federal courts may have acquired, has not impaired or affected the original jurisdiction of the state courts.

A court of equity cannot interfere to prevent the publication of private letters, merely on the ground that such a publication, without the consent of the writer, as a breach of confidence and social duty, is injurious to the interests of society.

The interference of the court can only be justified upon the ground that the writer has an exclusive property which remains in him, even where the letters have been transmitted to the person to whom they were addressed.

Held, upon a full examination of the adjudged cases, that the law must be considered as established,

1st. That the writer of letters, whether they are literary compositions, or familiar letters, or letters of business, possesses the sole and exclusive right of publishing the same; and that, without his consent, they cannot be published either by the person to whom they are addressed, or by any other.

2d. That the receiver of the letters may, however, justify their publication, when it is shown to be necessary to the vindication of his own rights or conduct, against unjust claims or imputations.

And lastly, That if the receiver attempt to publish the letters, or any parts of them, against the wishes of the writer, and upon occasions not justifiable, a court of equity is bound to prevent the publication by an injunction, as a breach of that exclusive property which the writer retains.

Held further, that, as against a stranger who has possessed himself of the letters or of copies thereof unlawfully, the right to restrain the publication by an injunction is absolute—such person not being justified in publishing the letters for any purpose whatever.

Held, that the cases of *Wetmore* agt. *Scovell*, (3 *Edw. Ch. R.*, 515;) and of *Hoyt* agt. *M^cKensie*, (3 *Barb. Ch. R.*, 314,) in which it was decided that an injunction to restrain the publication of private letters, can only be granted when it appears that the letters possess a certain value as literary compositions, were a departure from the law as previously established, and ought not, therefore, to be considered as binding authorities.

Woolsey agt. Judd and others.

Before OAKLEY, Chief J. ; DUEB, CAMPBELL, BOSWORTH, HOFFMAN and SLOSSON, JJ. *Decided* March 7, 1855.

THIS was an appeal from an order at special term, dissolving an injunction, but continuing the same, if the plaintiff should appeal within ten days, until the hearing of the appeal.

The complaint stated in substance, that the defendants, by some unlawful means, had possessed themselves of a copy or copies of a certain letter, wholly private in its character, which the plaintiff had written and forwarded to one William Crowell, residing at St. Louis, in Missouri; and that they had avowed their intention to publish the same in a weekly journal, called the New-York Chronicle, of which they were the editors, proprietors or publishers; and it prayed that they might be enjoined against printing, publishing, circulating, or in any manner, either by writing or otherwise, making public the said letter or any part thereof.

Mr. Justice CAMPBELL granted an injunction according to the prayer of the complaint; and the defendants moved, at special term, for its dissolution upon their answers, and upon affidavits.

The defendant, Judd, in his answer, denied that the letter in question was wholly private in its character; or, that by any unlawful means he had become possessed of a copy thereof. He averred that a copy of the letter was sent to him through the post office, accompanied by a note from a gentleman of the highest respectability, stating that he, the defendant, could make such use of it as he should think proper. He then alleged that the letter was not a literary production, nor of any value to the plaintiff as such; and, therefore, insisted that the court had no authority to restrain its publication, and demanded that the complaint should be dismissed with costs.

The answer of the defendant, McKay, was, in substance, the same.

The other defendants, Holman, Gray and Wilbur, denied, in their answer, that they or either of them, at the time of the commencement of the suit, or at any time since, had in their

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custody or possession the said letter, or any copy thereof. They admit that they were the publishers of the weekly Chronicle, but averred that they had no control over it, nor any power to direct or prevent the publication of the plaintiff's letter.

It is needless to state the contents of the affidavits. It is sufficient to say, that the defendant, Judd, avowing himself to be the editor of the weekly Chronicle, claimed the right to publish the letter in question, for the purpose of fixing upon the plaintiff, and his correspondent, Crowell, the imputation of being the authors or instigators of certain anonymous and abusive publications, relative to a religious society, called "The American Bible Union," its proceedings, agents, and friends.

At special term, Mr. Justice HOFFMAN, holding himself bound by the decision of Chancellor WALWORTH in *Hoyt* agt. *M^r Kenzie*, made the order appealed from.

The motion, upon the appeal for the reversal of this decision, was twice argued by

E. D. CULVER, *for the plaintiff*, and
W. W. NILES, *for the defendants*.

Upon the first argument, the counsel did not advert to an important section in the act of congress, entitled "An act to amend the several acts respecting copyrights," passed February 3, 1831. That section is in the following words :

Sec. 9, "That any person who shall print or publish any manuscript *whatever*, without the consent of the author first, obtained in writing, he shall be liable to an action for damages. And the several courts of the United States, empowered to grant injunctions to prevent the violation of the rights of authors, are hereby empowered to grant injunctions, in like manner, according to the principles of equity, to restrain the publication of any manuscript as aforesaid."

The second argument which was directed by the court, was confined to the questions, whether the provisions in the above section were applicable to private letters not intended to be

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published ; and, if so, whether the jurisdiction of the courts of the United States, to restrain their publication, was exclusive.

By the court—DUEK, Justice.—We think it a doubtful question, whether the act of congress of 1831, broad as its terms certainly are, was intended to apply, and ought, therefore, to be construed as applying, to cases like the present ; but it is to the courts of the United States, that the decision of the question properly belongs. It is not necessary that we should decide it, since we are clearly of opinion that the jurisdiction which, under the act of congress, the courts of the United States may have acquired, has not taken away or at all diminished that which, before the passage of the act, the state courts might rightfully have exercised. The general rule is undoubtedly, that which is laid down and fully vindicated by General Hamilton, in the 82d No. of the *Federalist*—namely, that the state courts retain their jurisdiction in all the cases of which originally they had cognizance ; and, in the application of this rule, the decisions in our own courts appear to have settled that there are only two classes of cases in which the jurisdiction of the courts of the United States may justly be regarded as exclusive. The first, where the jurisdiction is made exclusive by the express terms, or by the necessary construction of the provisions of the federal constitution. The second, when an act of congress confers a jurisdiction, that before its passage could not have been exercised at all—that is, when the act not merely *confers*, but *creates* the jurisdiction. (*United States* agt. *Lathrop*, 17 *John.*, 5 ; *Delafield* agt. *State of Illinois*, 2 *Hill*, 159,—*opinion of BRONSON, J.* ; *Dudley* agt. *Mahew*, 3 *Comst.*, 15.) It is obvious that to neither of these classes can we refer the case that we are now required to decide, if the views of the plaintiff's counsel, as to the original jurisdiction of the state courts, shall be sustained. If the jurisdiction we are called upon to exercise, was vested in the state courts before the act of congress was passed, it subsists unimpaired ; and hence, it is upon the question of its prior existence that, in

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our judgment, the whole controversy turns. If, in the exercise of a power that courts of equity in similar cases have been accustomed to exercise, we may grant the injunction that is prayed for, we do not at all doubt that it will be our duty to grant it.

We must, therefore, of necessity consider and determine the question, whether, upon the face of this complaint, and according to the established doctrine of equity, the plaintiff is entitled to the injunction prayed for.

The complaint does not aver that the letter of the plaintiff, to which it refers, has any value as a literary production, or that he will sustain any pecuniary damage, or any injury in his reputation or feelings from its threatened publication. It raises, therefore, the naked question, whether a court of equity is bound, or has power, to restrain, by injunction, the publication of private letters, in all cases in which it is alleged that the publication is about to be made without the consent, and contrary to the wishes, of the writer? The question is one of more than ordinary interest, and we have felt that it deserved to be examined with more than ordinary care.

We believe that few, who reflect upon the mischievous consequences which would certainly result from the unrestrained and frequent publication of private and confidential letters, will dissent from the opinion that it is highly desirable, looking to the best interests of society, that courts of equity should possess and firmly exercise the jurisdiction which is questioned. Our own views and feelings, we do not hesitate to declare, *correspond* entirely with those which Mr. Justice STORY, in the most elaborate and useful of his works, has very forcibly expressed. We agree with him, that the unauthorized publication of such letters, "unless in cases where it is necessary to the vindication of the rights or conduct of the party against unjust claims or imputations, is, perhaps, one of the most odious breaches of private confidence, of social duty, and of honorable feelings which can well be imagined. It strikes at the root of that free interchange of advice, opinions and sentiments, which seems essential to the well-being of society, and may involve

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whole families in great distress from the public display of facts and circumstances which were reposed in the bosom of others. in the fullest and most affecting confidence that they should remain forever inviolable secrets." (2 *Story's Equity Jur.*, § 946.)

But, although, with Mr. Justice STORY, we cannot do otherwise than condemn a practice which springs from the motives, and leads to the consequences which he has depicted, and which, from the feelings of resentment it is calculated to provoke, is dangerous to the peace as well as the morals of the community, we must not be understood to assert that these considerations are alone sufficient to justify the interposition of a court of equity.

It is not necessary to deny, that upon these grounds alone the jurisdiction of the court cannot safely be placed. A court of equity is not the general guardian of the morals of society. It has not an unlimited authority to enforce the performance or prevent the violation of every moral duty. It would be extravagant to say that it may restrain, by an injunction, the perpetration of every act which it may judge to be corrupt in its motives, or demoralizing, or dangerous in its tendency. We advance no such doctrine, and we fully admit that an injunction can never be granted, unless it appears that the *personal* legal rights of the party who seeks the aid of the court, are in danger of violation; and as a general rule, that the injury to result to him from such violation, if not prevented, will be irreparable. It must be shown that a right is endangered which the law defines and is bound to protect, and that the mandate of the court is its only adequate protection; but when, by proof of these facts, the jurisdiction is established, we cannot doubt that considerations of public good and public policy, may furnish motives, and powerful motives, for its prompt and effectual exercise. They may invest the legal right with an importance and dignity that would not otherwise belong to it, and convert the protection of a single individual into an extensive public benefit.

It being conceded that reasons of expediency and public

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policy can never be made the sole basis of civil jurisdiction, the question, whether upon any ground the plaintiff can be entitled to the relief which he claims, remains to be answered; and it appears to us that there is only one ground upon which his title to claim, and our jurisdiction to grant, the relief can be placed. We must be satisfied, that the publication of private letters, without the consent of the writer, is an invasion of an exclusive right of property which remains in the writer, even when the letters have been sent to, and are still in the possession of his correspondent. If this legal right can be shown to exist—it seems evident that it is only by an injunction that it can be protected from invasion. The rule laid down by Lord ELDON in *Southey* agt. *Sherwood*, we apprehend is universal, that an injunction will be granted whenever it is necessary to prevent the unauthorized use of that which is the exclusive property of another. (2 *Merivale*, 437.)

We commence the inquiry into the existence of the legal right which we have stated is necessary to be proved, with observing, that there is probably no doctrine which, in general, is more fully sustained, and, indeed, established by authority, than that the author of an unpublished manuscript has an exclusive right of property therein at common law—a right which entitles him to determine for himself, whether the manuscript shall be published at all; and in all cases to forbid its publication by another; and it is equally certain, that whenever this exclusive right is in danger of being violated, a court of equity is bound, upon the application of the author, to prevent the wrong by a perpetual injunction; so far, there is no controversy. The language of text writers is uniform and positive; the decisions numerous and express. (*Forrester* agt. *Waller*, cited 2 *Brown P. C.*, *Tompkin's* ed., p. 138, and by Lord MANSFIELD, 4 *Burr*, 2320; *Webb* agt. *Rose*, *id*; *Donaldson* agt. *Beckett*, 4 *Burr*, 2408; *Duke of Queensbury* agt. *Shebbeare*, 2 *Eden Ch. R.*, 329; *Southy* agt. *Sherwood*, 2 *Merivale*, 434; *Wheaton* agt. *Peters*, 8 *Peters' S. C. R.*, 591; *Eden on Injunctions*, 295, 296; 2 *Story Eq. Jur.*, § 943; *Curtis on Copyright*, pp. 84, 150, 159.) Nor has this common law right

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been taken away or abridged by the statutes that have been passed for the protection of copyright, in the ordinary sense of the term. Its existence is prior to these statutes, and independent of their provisions. In the great case of literary property, (*Donaldson* agt. *Beckett*, 2 B. P. C., 130; 4 *Burr*, *ut sup.*) in which it was finally determined by the house of lords, that the perpetual right of authors in their *published* works, if it existed at all at common law, was taken away by the statute of Anne, and reduced to the period which the statute allows; it was affirmed by all the judges, with a single exception, not only that an author has, at common law, the sole right and dominion over his own manuscript; but that this established right was not changed or affected by the provisions of the statute. The right is still absolute and exclusive; and so long as the manuscript may exist unpublished, and its author or his representatives may choose, perpetual.

What then is the foundation at common law of this exclusive right? Does it exist only when the manuscript is intended to be published? or does it depend upon its pecuniary value or intrinsic merits as a literary composition? To each question, we think, the reply may be confidently given, certainly not. In none of the cases is there any reference to these circumstances, or any of them, as necessary to be averred or proved, in order to establish the rights of the author or the jurisdiction of the court; and in some, the admitted facts repel the supposition that such proof could be required.

In *Webb* agt. *Rose*, where the injunction was granted to restrain the publication of certain drafts of settlements and other conveyances, which had been stolen by a clerk from the office of a conveyancer, and sold to a bookseller—the drafts were used in the office as forms and precedents, and there is no reason to suppose that they were meant to be published, either by the conveyancer who prepared them, or his representative who brought the suit. Their sole value, probably, consisted in their exclusive possession and use.

In *Forrester* agt. *Waller*, it does not appear that the notes of decisions to which the injunction related, were written with

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any view to their future publication. It would seem that they were taken by Mr. Forrester for his own private use ; and it is doubtless for this reason that Lord EDON says, that the decision in this case certainly applies to private letters. (2 *Swanston*, p. 426.)

We, therefore, agree entirely with the able author of the American treatise on the law of copyright ; that the exclusive right of an author in a manuscript yet unpublished, rests upon the same foundation as that which sustains every other species or description of property. Its sole foundation is "the right which every man has to the exclusive possession and control of the products of his own labor." (*Curtis on Copyright*, p. 84.) We can perceive no reason for doubting that the exclusive property of an author rests exactly upon the same ground as that of a manufacturer or artist—a painting may be a wretched daub—a statute, a lamentable abortion ; yet, should either be purloined by an enemy with the view to secure profits to himself, or to disgrace the artist by its public exhibition, a court of equity would renounce its principles should it refuse to protect the owner, the unfortunate artist, by a peremptory injunction. Such being the true foundation of the exclusive right of an author before publication ; the next inquiry is, into the nature and extent of his right. And it is assuredly a great mistake to suppose that it is confined to the material on which his manuscript is written ; and that it is only because he is owner of the paper that a court of equity interferes for his protection. This is so far from being true, that had he no other right of property than in the paper, we hold it to be certain that a court of equity would not interfere at all ; and we affirm with confidence, that no case is to be found in which the court has interfered upon this ground. Merely as owner of the paper, an action at law, in which the measure of damages would be the value of the material, would afford him a full and adequate remedy, and to this remedy he would undoubtedly be left. The exclusive right, which alone a court of equity is bound to protect, and which, from its nature, can only be protected by an injunction, is his right of property in the words, thoughts

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and sentiments which, in their connection, form the written composition which his manuscript embodies and preserves. This composition—whether, as such, it has any value or not, is immaterial—is his work, the product of his own labor, of his hand and his mind ; and it is this fact which gives him the right to say that without his consent it shall not be published, and makes it the duty of a court of equity to protect him in the assertion of that right by a permanent injunction. Of this, it is a conclusive proof, that the right to control the publication of a manuscript remains in the author and his representatives, even when the material property has, with his own consent, been vested in another. The gift of the manuscript it is settled, unless by an express agreement, carries with it no license to publish. (*Duke of Queensbury* agt. *Shebbean*, 2 *Eden*, 339 ; *Thompson* agt. *Stanhope*, *Ambler*, 737.) Not only is the right of property in the author not subject to the limitation which some have supposed to exist, but it is absolute as well as unlimited. When he applies for an injunction, it is not necessary that he should aver that he desires to take from the defendants, or to secure to himself, the profits of publication. As owner, he has an absolute right to suppress as well as to publish ; and he is as fully entitled to the protection and aid of the court, when suppression is his sole and averred object, as when he intends to publish. In the remarkable case of *Southy* agt. *Sherwood*, which, at the time, was the subject of great discussion in England, the avowed object of Mr. Southy was to suppress entirely and forever the publication of a very rash and intemperate production of his youth, and the injunction prayed for would certainly have been granted, had not Lord ELDON been of opinion that the character of the work, as a seditious libel, by destroying the author's right of property, deprived him of the claim he would otherwise have had to the protection of the court. (*Southy* agt. *Sherwood*, 2 *Merivale*, 435 ; *Earl of Granard* agt. *Dunhen*, 1 *Ball & Beat.*, 207 ; *Curtis on Copyright*, 157, 158, 159.)

The general doctrine, as to the right of an author in an unpublished manuscript, being such as we have now endeavored

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to explain, it is evident that it casts the burthen of the argument upon those who contend that private letters must be excepted from its application. If the doctrine is just as applicable to them as to all other manuscripts, it is clear that the plaintiff is entitled to the relief which he claims. It must be shown, therefore, that there are valid reasons for admitting an exception of private letters, or that the exception, whether reasonable or not, is established by decisions that we are not at liberty to disregard. Whether we are bound to adopt the reasons or follow the authorities that are relied on, are the questions next to be considered.

There are only two grounds upon which it has been insisted that private letters are an exception from the general doctrine. The first is, that the transmission of the letters vests the whole property in the receiver, and operates as an absolute gift. The second—that if the writer retains any property at all, it is only in such letters as are stamped with the character and possess the attributes of literary compositions.

The first ground of exception, as plainly overruled by the decisions, was very properly abandoned by the counsel of the defendants. He rested his whole argument upon the second; and, holding himself excused from any close examination of the English cases, relied upon the decision of Chancellor WALWORTH, in *Hoyt* agt. *M'Kenzie*, as a binding and conclusive authority. (3 *Barb. Ch. Cases*, 324.)

Now, it cannot be denied that the decision in *Hoyt* agt. *M'Kenzie* is an express authority in favor of the defendants; and if, as is asserted, we are under a positive obligation to follow that decision, it must be owned that we have no power to grant to the plaintiff the relief which he claims. The Chancellor, in that case, dissolved an injunction, which the plaintiff had obtained to restrain a very mischievous and dishonest publication of confidential letters, upon the sole ground "that it was evident the plaintiff could not have considered the letters as of any value whatever as literary productions, for a letter cannot be considered of value to the author for the purpose of publication, which he never would consent to have published."

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They are the exact words of the Chancellor which we have quoted, and it is plain that they amount to a positive denial that an author of private letters, which he wishes to suppress, and not to publish, has any right of property at all—that he has any right to say that they shall not be published by another, unless he means to publish them himself. The Chancellor did not deny that, as a general rule, the author of an unpublished manuscript has at common law an exclusive right of property, the violation of which may justly be prevented by an injunction; for he distinctly admits that this is the *settled* law. But he certainly meant to deny that the plaintiff, in the case before him, had any property in the letters which he desired to suppress, and consequently, the position upon which he rested his judgment may be briefly stated as follows:—Private letters not intended to be published, have no value whatever; and when they have no value for the purpose of publication, they are not property. In a subsequent part of his opinion, the Chancellor expresses, in terms, his approbation of the final decision of Vice-chancellor M'Coun, in *Wetmore* agt. *Scovill*, (3 *Edwards Ch. R.*, 515,) that letters not professing the attributes of literary compositions are not, as property, entitled to protection.

In proceeding to examine, as we now propose, whether it is possible to reconcile this opinion of the late Chancellor, with the law as settled by prior decisions, and among these the very cases to which he has himself referred, we must not be understood as meaning to detract in any degree from the weight and authority to which his decisions, as those of a very able, learned and laborious judge, are generally and justly entitled. The judges of this court have frequently manifested the high sense which they entertain of his judicial merits, and it is with reluctance that we dissent, on any occasion, from any deliberate judgment which he has pronounced. But we deny that a recent and solitary *decision* of any judge, however eminent, ought to be regarded by us as conclusive evidence of the existing law; and we deny that we are bound by the decisions of the Chancellor, in the same sense in which we are bound by *those* of the court of *ultimate* resort. We stand now in the same re-

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lation to the court of appeals, as that in which he stood to the court of errors; and in the cases in which we exercise an equitable jurisdiction, have succeeded to all the powers which he possessed in similar cases. We have, therefore, exactly the same right to review, and, when convinced that errors have intervened that ought not to be perpetuated, to overrule his decisions, that he himself, and his successors in office, had not the court of chancery been abolished, might and would have exercised. It is known to us all that the cases are numerous in courts of equity, as well as of law, in which judges have felt it their duty to reconsider and reverse their own decisions and those of their predecessors; and deplorable, indeed, would be the actual state of the law, (as none who have examined the valuable treatise of Mr. Greenleaf, on overruled cases, will doubt,) had not these powers of revision and correction been frequently and firmly exercised. We must all remember that the judgment in *Hoyt agt. M'Kenzie*, from the sanction which it apparently gave to a very dishonorable proceeding, excited general surprise and regret, so that even those who admitted its legality, were anxious to relieve the law from the reproach which it occasioned. We are convinced that this reproach, that of giving a sanction to immorality, is one to which the law was never justly liable, and from the continuance of which it ought, therefore, to be freed.

The proposition which we hold to have been settled as law, for more than a century before the judgment in *Hoyt agt. M'Kenzie* was pronounced, is that which was laid down by Sir SAMUEL ROMILLY, and affirmed by the decision of Lord ELDON, in *Gee agt. Pritchard*, (2 *Swanston*, 418.) It is that "the writer of letters, though written without any purpose of publication or profit, or any idea of literary property, possesses such a right of property in them, that they can never be published without his consent, unless the purposes of justice, *civil* or *criminal*, require the publication." If this proposition be true, it follows that the distinction which has been supposed to exist between letters possessing a value as literary compositions, and ordinary letters of friendship or business, is wholly ground-

less. The right of property is the same in all, and in all is entitled to the same protection.

The earliest case, and that which may be truly said to have established the *law*, since its controlling authority is admitted in all that follow, is *Pope agt. Curl*, (2 *Ath.*, 342.) An unknown person, by means never explained, had possessed himself of a large number of private and familiar letters, which had passed between Mr. Pope and his friends Swift, Gay and others, and had printed them secretly in Ireland, in a book entitled "Letters from Swift, Pope and others." The defendant, a piratical bookseller in London, had purchased and advertised for sale the printed copies of this book—and the plaintiff had obtained an injunction restraining the sale.

It was upon a motion to dissolve this injunction, that the case came before Lord HARDWICKE. It is briefly reported, but there is no difficulty in collecting either the grounds upon which the motion was rested, or those upon which it was denied.

It was contended by the defendant's counsel, that as the printed book contained only letters never intended to be published, and written on familiar subjects—such as inquiries after the health of friends, and other similar topics—it was not a learned work, and therefore was not within the meaning and intention of the statute of Anne, (8 *Anne*, c. 19,) vesting the copy-right of printed books in the authors. The argument was, that as the writer of such letters could not, by printing them, secure a copy-right to himself, he could have no right to prevent them from being printed by others. Lord HARDWICKE put an end to this argument, by observing that it would be extremely mischievous to make a distinction between a book of letters, published by the permission of the writer or receiver, and any other work; and to show that the objection that the letters were not written to be published was groundless, he remarked, that it would apply equally to sermons which the authors never intended should be published, but which are collected from his notes, and published after his death. In a subsequent part of his opinion, and in reply to the same objec-

tions, he observed, and proved the justness of his taste in the observation, that letters never intended to be published, and written on familiar subjects, are usually more *interesting and valuable* than those elaborately written and originally intended for the press.

We have here, then, a positive decision that private letters, although not intended to be published, and however familiar and trivial the subjects to which they relate, are a legitimate subject of a statutory copy-right, which a court of equity is bound to protect; and it is an obvious and necessary consequence of this decision that the writer of such letters has an absolute right to forbid their publication by another, since by such a publication, if not restrained by an injunction, his own right to publish them for his own benefit, under an exclusive copy-right—a right inherent in him and his representatives, until it is chosen to be asserted—would be defeated. Had not this consequence, obvious and necessary as it is, been overlooked, the obligation of a court of equity to protect, by an injunction, the writer of such letters, without any other inquiry than into the fact of his authorship, could never have been drawn in question by any who admit the authority of the decision itself.

The second objection which was urged by the defendant's counsel in *Pope* agt. *Curl*, was far more plausible. It was, that the sending of letters is in the nature of a gift to the receiver, and, consequently, that the writer retains no property at all.

The answer of Lord HARDWICKE to this objection I shall give in his exact words as reported, in order that it may be seen how entirely they exclude any reasonable doubt as to its import and effect. His words are—"I am of opinion that it is only a special property in the receiver. Possibly the property in the paper may belong to him, but this does not give a license to any person whatsoever to publish them (the letters) to the world; for at most, the receiver has only a joint property with the writer." Such were the grounds upon which this eminent judge continued the injunction as to the letters written by Mr. Pope, but dissolved it as to those which he had received, plainly be-

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cause, as receiver, he had no right of property which entitled him to control their publication. The decision was made in 1741. There was no appeal. It has been, from that time to the present, unquestionable and unquestioned law. Doubts have been raised, it will hereafter be seen, as to its meaning and application; none whatever as to its controlling authority. Chancellor WALWORTH himself refers to it as evidence of that common law which our first state constitution declared could only be altered by legislative authority, and which he held himself bound to follow. If, therefore, he departed from the positions it established, we have his own acknowledgment that he erred.

What, then, are the propositions which Lord HARDWICKE, by his decision in *Pope agt. Curl*, established as law? It seems to us, that by the plain and necessary interpretation of his language, they are these:—*First*, That the receiver of letters has only a special or qualified property, confined to the material on which they are written, and not extended to the letters as expressive of the mind of the writer. *Second*, That neither the receiver thereof nor any other person has any right to publish the letters without the consent of the writer. And, *lastly*, That the property which the writer retains gives him an exclusive right to determine whether the letters shall be published or not; and, when he forbids their publication, makes it the duty of a court of equity to aid and protect him by an injunction. It appears to us equally certain that these rules are laid down, and were meant to be laid down, as universal in their application, as embracing all letters, whether intended to be published or not, and whatever may be the subjects to which they relate. Not only was there no intimation that there is any distinction between different kinds or classes of letters, limiting the protection of the court to a particular class; but the distinctions that were attempted to be made, and which seem to be all that the subject admits even, expressly rejected as groundless.

The next case—*Thompson agt. Stanhope*, (*Ambler*, 737,) which is perhaps even stronger than *Pope agt. Curl*—came before Lord BATHURST, (then Lord APSLY,) in 1774. The

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executors of Lord Chesterfield filed the bill to enjoin the publication, by the widow of his son, of those celebrated letters which, for a series of years, he had written to her husband; and also the publication of certain characters, probably not very flattering, which he had drawn in writing of some of his contemporaries. The motion to dissolve the injunction was made on the ground that Lord Chesterfield had himself given to the widow both the letters and the characters—and the fact seems to have been admitted. But it was contended, on the part of the plaintiffs, that there being no proof of an express authority to publish, none could be implied from the gift, and that consequently the exclusive right to control the publication remained in Lord Chesterfield, and had passed to his representatives. The Lord CHANCELLOR was of this opinion, and, declaring himself bound by the authority of *Forrester agt. Waller*, and *Pope agt. Curl*, continued the injunction. It does not appear, from the report, to have been alleged that the letters or characters were written by Lord Chesterfield with any view to their future publication, or that the publication of either was intended by the plaintiffs.

We come next, after a lapse of nearly forty years, and of more than seventy from the decision of Lord HARDWICKE, to the case of *Lord and Lady Percival agt. Phipps and another*, (2 *Ves. & Beames*, 19,) and we find here, not in the decision itself, but in the somewhat desultory, and wholly extra-judicial remarks of the vice-chancellor, Sir THOS. PLUMER, the true and only source of all the doubts and difficulties that have been permitted to embarrass the question, and have, unfortunately, led to a conflict of decisions. The bill prayed for an injunction to restrain the publication, by the defendants, of certain private letters, which, it was alleged, had been sent by Lady Percival to the defendant Phipps, and in its frame bore an exact resemblance to the complaint before us. It was described by the VICE-CHANCELLOR "as the naked case of a bill to prevent the publication of private letters, not stating the nature, subject, or occasion of them, or that they were intended to be sold as a literary work for profit, or were of any value to

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the plaintiffs." Upon this bill, the injunction prayed for was granted by Lord ELDON; and that it was granted upon full deliberation, is evident from the fact that, not considering the statements in the bill sufficiently explicit, he required from Lady Percival, in order to bring the case within *Pope* agt. *Curl*, a positive affidavit that she was the author of the letters. (2 *Ves. & Beames*, 26.) The answer of the defendants, upon which their counsel moved to dissolve the injunction, set forth certain facts, tending to show that the publication of the letters was necessary to repel a charge of falsehood and forgery, which the plaintiffs had publicly made against them. And it was upon the sole ground that the conduct of the plaintiffs had given to the defendants a perfect right to use the letters for their own vindication, that the VICE-CHANCELLOR dissolved the injunction; and the propriety of this decision is not questioned.

But although this was the sole ground of his decision, and the consideration, therefore, of any other *question quite unnecessary*, the VICE-CHANCELLOR, both upon the hearing and on delivering his final judgment, chose to discuss the general question, how far, and in what cases, a court of equity will interpose to protect the interest of the author of private letters. And in the course of his observations he lays down, in positive terms, the novel doctrine, that it is only when the letters—[in his own words]—"are stamped with the character of literary compositions," that the writer can be protected by an injunction against their publication. And he, in effect, asserts that the character and value of the letters of Pope and Lord Chesterfield, as literary compositions, was the true and only ground of the decisions in *Pope* agt. *Curl*, and *Thompson* agt. *Stanhope*, and consequently that these cases were inapplicable to that which was before him—it not being pretended that such was the character of Lady Percival's letters. The VICE-CHANCELLOR did not say, in terms, that Lord ELDON erred in granting the injunction; but if his remarks were just, and the distinction he stated well founded, such is the necessary consequence. If his doctrine was law, and his interpretation of

former decisions correct, it is clear that the injunction ought not to have been granted.

The vindication of Lord ELDON from the criticisms and implied censure of Sir THOS. PLUMER, will seem, to all who have any knowledge of their relative standing and authority as jurists and judges, a very gratuitous task—and it is a task from which we should certainly have abstained, had it not unfortunately happened that the rash speculations of the latter have been followed, in preference to the deliberate judgments of the former.*

It is undoubtedly true that the letters of Pope, and of Lord Chesterfield, possessed a far more than ordinary value as literary compositions; but there is not the slightest evidence that it was upon this distinctive character and value that Lord HARDWICKE, in *Pope* agt. *Curl*, or Lord BATHURST, in *Thompson* agt. *Stanhope*, founded his decision.

On the contrary, in each case, the doctrine is laid down in general terms, with no intimation that there is or can be an exception, that the writer of letters has an exclusive right not only to publish them himself, but to forbid their publication by others; and that a court of equity is bound to enforce his prohibition by its own injunction. That these cases were thus understood by Lord ELDON is certain, since otherwise the injunction which the VICE CHANCELLOR dissolved would never have been granted.

It cannot, therefore, be said that the views of Sir THOMAS PLUMER derive any countenance from prior decisions. It remains to be seen whether they have any solid foundation in reason. All that he says proceeds upon a distinction which, it seems to us, either does not exist at all, or, if exists, has no practical value. In other words, furnishes no rule which a

* Extract from the private diary of Sir SAMUEL ROMILLY, under date of April 9th, 1813,—about two months before the decision in *Percival* agt. *Phipps*:—

“A worse appointment than that of PLUMER to be Vice-Chancellor could hardly have been made. He knows nothing of the law of real property, nothing of the law of bankruptcy, and nothing of the doctrines peculiar to courts of equity.”—*Memoirs of the Life of Sir Samuel Romilly*, Vol. 2, p. 310.

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court of justice can rationally or consistently apply. The assertion is, that some private letters are literary compositions, and some are not. Those which are, may be protected as property; those which are not, may be stolen and published with impunity—the writer has no property, and sustains no injury.

But we agree with Mr. Justice STORY, (2 *Story R.*), that every letter is, in the general and proper sense of the term, a literary composition. It is that and nothing else; and it is so, however defective it may be in sense, grammar, or orthography. Every writing, in which words are so arranged as to convey the thoughts of the writer to the mind of a reader, is a literary composition; and the definition applies just as certainly to a trivial letter as to an elaborate treatise, or a finished poem. Literary compositions differ widely in their merits and value, but not at all in the facts from which they derive their common name.

To create, therefore, the distinction that has been assumed to exist, it is evident that the words, "literary composition," must be understood in a peculiar and restricted sense, which renders them applicable to a particular class of letters, and not to any others; and it is just as evident that, to enable courts of justice to act upon the distinction, this restricted sense of the words must be ascertained and defined. This is only saying, that the distinction must be understood before it can be applied. Hence the necessary inquiry is, what are the peculiar circumstances, the distinctive qualities, or attributes, that must be found to exist, in order to stamp upon letters the character of literary compositions? Upon this inquiry, the observations of Sir THOMAS PLUMER throw no light whatever. The learned judge shrouded his meaning in loose and vague generalities—and from these we must endeavor to extract it. He probably meant to say, either that letters are not to be regarded as literary compositions, unless it appears that they were originally written with the intent to publish them, or that their author would derive from their publication a certain profit, or that from their intrinsic merits their publication would be a benefit

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to the world. Intended publication, pecuniary value, or intrinsic merit must furnish the requisite test—nor are we aware that any other has been suggested or can be stated.

Now it is manifest, that if either of these circumstances is to be admitted as the test of literary composition, it is a test which cannot be limited in its application to private letters. It is just as applicable, not only to all other unpublished manuscripts, but to all printed books. If a letter, destitute of certain qualities or attributes, is not a literary composition, neither is a book to which exactly the same qualities are wanting. The inherent qualities of the manuscript are not altered by its publication—and certainly no addition is made to them by the process of printing. Hence, if private letters, which, in the restricted sense which Sir THOMAS PLUMER adopts, are not literary compositions, as not within the spirit of the acts of parliament securing a copy-right to authors,—(for such is the argument,)—are not entitled to protection as literary property, it follows, that printed books which, in the same sense, are not “literary compositions,” as equally not within the spirit of these acts, ought to be excluded from the benefit of their provisions. The statement of this necessary consequence is of itself a sufficient refutation of the whole doctrine of the VICE-CHANCELLOR; for assuredly it has never been pretended that the copyright of the author of a published book is liable to be impeached and defeated by inquiry into his intentions in writing it, or into the *merits* or value of his work as published.

If, therefore, the question, whether a book is a literary composition can never be raised, as involving that of the right of property in the author, there is a plain inconsistency in permitting the application of the test to unpublished manuscripts, whether private letters or of any other class. The writer of letters, if he choose to print them himself, may obtain a valid copy-right—and whether he will obtain it rests entirely in his own discretion: so long, however, as the letters are preserved, the right of obtaining the statutory copy-right exists in the writer and his representatives; and while it exists it is, in its nature, a right of property which a court of equity is as much

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bound to protect as any other. It is a right, however, which the court effectually defeats by permitting, in any case, the publication of letters without the consent of the writer. There can be no exclusive copy-right, if all may publish with impunity.

To pass from these general observations.

The proposition, that in familiar letters, not intended by the writers to be published, there can be no property which a court of equity will protect from invasion, is precisely that which, in *Pope* agt. *Curl*, and in *Thompson* agt. *Stanhope*, is expressly overruled. There is no evidence that the letters of Pope, and his friends, or those of Lord Chesterfield, were originally written for the press. And in relation to those of Pope, the report shows that the fact was admitted to be otherwise. There is, moreover, a positive absurdity in making the character of any manuscript, as a literary composition, depend upon the extrinsic and accidental fact of the intention to publish. Apply this test, and the plays of Shakespeare are not literary compositions, since there is every reason to believe that not a single play was written with any view to its future publication.

There is the same confusion of ideas and language, in making the character of a manuscript, and the right of property in the author, depend upon the accident of its value for publication—its pecuniary or marketable value. Booksellers are eager to purchase the copy-right in the autobiography of a shameless adventurer or self-convicted impostor; but we doubt whether one can be found within the limits of the Union who, even without any hazard of competition, would dare to publish, at his own risk and expense, the Principia of Newton, or the Systeme of La Place, or even a full edition of the prose works of Milton.

Rejecting, then, as we must, the tests “of intended publication,” and “pecuniary value,” it remains to consider whether the character of letters as literary compositions, and therefore literary property, may be determined by a reference to their

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contents and intrinsic merits—the merits of language and thought, style and sentiments.

It must be admitted that the differences, in these respects, between familiar letters, as between all other productions of the intellect, are wide and strongly marked, and fully justify their distribution by critics into many distinct classes; but we seriously deny that it is possible to extract from these differences any *rule of classification*, which a court of justice can be warranted to adopt as a *rule of decision*.

If the question, whether the letters of which the publication is sought to be restrained, from the nature of the subjects to which they relate, of the sentiments they convey, or the style in which they are clothed, deserve to be classed with literary compositions, is to be determined by the judge to whom the application for relief is made, it is evident that his determination must, and will be governed by his own personal, and it may be, peculiar opinions, taste, studies, and associations. The determinations in such cases will, therefore, be just as various and inconsistent as the literary taste and attainments, and the casual predilections and prejudices of the judges by whom they are pronounced. The letters extolled by one as full of interest or instruction, will be condemned by another as utterly worthless. The injunction granted to-day will be dissolved, or, in cases not distinguishable, be denied to-morrow; and the questions of the right of property, and its title to protection, will be resolved, not by the application of rules of law to facts admitted or proved, but in the exercise of a discretion constantly varying and purely arbitrary. The decisions in most cases will appear to be, and in many will be, the mere result of accident or ignorance, prejudice or caprice. Whether the letters which he has written possess literary merits which render them worthy of publication, is a question which it belongs to the writer alone, and the public, to determine. It is exactly one of those which, from the necessary and total absence of any fixed rules or principles of decision, a court of justice can never rightfully entertain.

It follows, from these remarks, that the test of intrinsic

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merits must also be rejected. At first view, it seems less unreasonable than that "of intended publication," or "pecuniary value;" but, as it admits no certain definition, and is necessarily shifting, and precarious in its application, it is, in reality, more objectionable than either. Any definite rule is better than an unlimited discretion.

The error, which lies at the foundation of all the reasoning of Sir THOMAS PLUMER, is that which an able writer, to whose valuable treatise on the law of copy-right we have before referred, has very clearly stated. The VICE-CHANCELLOR confounds the rights of property in an unpublished manuscript, with those in a published book. The exclusive right of the author of the book is to take the entire profits of publication. That of the writer of the manuscript, to control the act of publication, and, in the exercise of his own discretion, to decide whether there shall be any publication at all. (*Curtis on Copy-right*, p. 93.)

In making the right of property in letters depend on their value for publication, as the VICE-CHANCELLOR certainly does, he denies, by a necessary implication, that the writer has any title to relief at all, when his object is not to publish, but suppress. If the character or value of letters, as literary compositions, alone *creates* a right of property in the writer, these facts, when an action is brought to restrain an unlicensed publication, as those upon which the right to maintain the action depends, must necessarily be averred in the complaint. If averred in the complaint, they may be denied in the answer; and if so denied, they must be proved upon the trial. The plaintiff must then either abandon his suit, or make the necessary proof by making the letters themselves, or copies, exhibits in the cause—and thus publish them himself to all the world, to prevent their publication by the defendant.

According to this doctrine, should a faithless clerk, who has secretly taken copies of the confidential business letters of the merchant who employed him, from motives of revenge, and with the design of blasting the credit and ruining the fortunes of his employer, threaten to publish them, the merchant would

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have no redress in equity or at law. He cannot say that his letters have value as literary compositions, or that he meant to publish them for his own benefit; he has therefore no property that a court of equity can be required to guard from invasion; and as there is no violation of any of his rights of property, he can recover no damages in an action at law. An indignant public may condemn the vile treachery of the clerk, but it is a treachery that equity will not prevent, and the law refuses to punish. Such is the doctrine of Sir THOMAS PLUMER, and, I regret to say, the doctrine in *Hoyt agt. Mackenzie*. We cannot, however, believe that such is, or ever has been, the doctrine of the common law, and that it has found no favor in England; but, on the contrary, has been decisively rejected, as the case next to be cited will conclusively show.

In *Gee agt. Pritchard*, (2 *Swanston*, 402,) the last of the English cases, it is interesting to observe with what a gentle yet firm hand Lord ELDON sweeps away the unsubstantial theories and distinctions of this VICE-CHANCELLOR, and, scattering doubts that ought never to have been raised, resettles the law upon its old and true foundation. The case was before him on a motion to dissolve the injunction which he had previously granted, forbidding the publication, by the defendant, of a number of private and confidential letters, which had been written to him by the plaintiff in the course of a long and friendly correspondence. The plaintiff was a widow lady, and the defendant the natural son of her late husband; and they had lived for many years on terms of great intimacy and kindness. Disputes, however, had arisen between them relative to the property left by her husband; and in consequence of these, at the request of the plaintiff, he had returned to her the original letters; but he had kept copies, from which he now claimed the right to publish them, in vindication of his own proceedings and conduct. Two questions were raised and fully argued by the most eminent counsel then at the chancery bar. First, whether the plaintiff had such a property in the letters as entitled her to forbid their publication—it being fully admitted that they had no value whatever as literary compositions, and that she never meant to publish

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them ; and, second, whether her conduct towards the defendant had been such as had given him a right to publish the letters in his own justification or defence. These questions were properly argued as entirely distinct, and each was explicitly determined by the Lord CHANCELLOR in favor of the plaintiff. The motion to dissolve the injunction was accordingly denied, with costs. It has been said, that it was through considerable doubts that Lord ELDON struggled to this decision : but the doubts which he expressed related solely to the question, whether it ought originally to have been held that the writer of letters has any property in them after their transmission. He had no doubts whatever that such was the established law, and that he was bound to follow the decisions of his predecessors. He expressly says, that he would not attempt to unsettle doctrines which had prevailed in his court for more than forty years, and could not therefore depart from the opinion which Lord HARDWICKE and Lord APSLY had pronounced in cases (*Pope agt. Curl, Thompson agt. Stanhope*) which he was unable to distinguish from that which was before him. (2 *Swanston*, 450.) Subsequently, in support of his opinion that the plaintiff had a sufficient property in the original letters to authorize an injunction, he refers to the language of Lord HARDWICKE, (quoting the exact words, in *Pope agt. Curl*,) as proving the doctrine, that the receiver of letters, although he has a joint property with the writer, is not at liberty to publish them without the consent of the writer ; which is equivalent to saying that the latter retains an exclusive right to control the publication. He then adverts to the decision of Lord APSLY in *Thompson agt. Stanhope*, as following the same doctrine, and declares that he could not abandon a jurisdiction which his predecessors had exercised, by refusing to forbid a publication in a case to which the principle they had laid down, directly applied. (*Id.* pp. 424-427.) He then says, "Such is my opinion ; and it is not shaken by the case of *Lord and Lady Percival agt. Phipps*," and significantly adds, "I think it will be extremely difficult to say where the distinction is to be found between private letters of one nature, and private letters of another nature ;" by "diffi-

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sult," plainly meaning "impossible," since if a case could exist in which the distinction could be made, it was the case then before him, in which it was certain that the letters were not written for publication, nor then meant to be published—had no literary merits to render them worthy of publication, and if published would have no pecuniary value, consequently were not, in the sense of Sir THOMAS PLUMER, literary compositions, and literary property. We do not see how it was possible to overrule more effectually the distinction, made by Sir THOMAS PLUMER, between private letters of one nature and those of another, and the doctrine which he founded on that distinction, than by refusing to apply them in a case to which, if they were ever to be admitted as law, they were evidently applicable, and in the most emphatic sense of the term.

It has, indeed, been said that the decision of Lord ELDON, in *Gee agt. Pritchard*, is not at all inconsistent with the observations of the VICE-CHANCELLOR in *Percival agt. Phipps*, and was not intended to overrule them. It is admitted that Lord ELDON decided that Mrs. Gee had a property in the letters which authorized him to grant and continue the injunction; but it has been insisted that the property, which he held himself bound to protect, was her property in the letters as a material chattel—that is, her property in the paper on which the letters were written, and which was vested in her in consequence of their having been returned by the defendant, and being then in her possession. But, with high respect for the learned judge by whom this has been said, we find it impossible to believe that the ground of Lord ELDON's decision was such as has been stated. Had such been his meaning, Lord ELDON would never have referred to the decisions of Lord HARDWICKE and Lord APSLY, as having established the principle by which he meant to be governed. Neither in *Pope agt. Curl*, nor in *Thompson agt. Stanhope*, was there a return of the original letters; and in the last case the material property in the letters, it was admitted, was vested in the defendant by an absolute gift from the writer. Any reference to these cases, had the ground of Lord ELDON's opinion, that Mrs. Gee had a property

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in the letters which entitled her to an injunction, been such as has been supposed, would have been unnecessary and irrelevant; and had he not been fully aware that his opinion was inconsistent with the observations of his VICE-CHANCELLOR, he would not have said that "it was not at all shaken by *Percival agt. Phipps*;" nor would he have spoken at all of the difficulty of making a distinction between private letters of one nature and those of another, had he not been urged to make the distinction, and deemed it necessary to overrule it.

There are other reasons which make it impossible for us to believe that the meaning of Lord ELDON was such as has been imputed to him. As the letters had been returned to Mrs. Gee, we cannot understand how her property in the paper, which was in her actual possession, could be violated or endangered by a publication from the copies which the defendant had kept—and it is not pretended that she had any property in the paper on which these copies were written. And were a property merely in the paper on which letters are written a sufficient ground for an injunction to restrain their publication, it is manifest that the receiver, who all agree, unless he had returned the letters, has a property in the paper, would have the same right to obtain such an injunction, as the writer: yet we have seen that, in *Pope agt. Curl*, Lord HARDWICKE dissolved the injunction as to all the letters written to Mr. Pope, upon the ground that, although as receiver he owned the paper, he had no right as such to control and forbid the publication.

It is very true, as the learned judge to whose peculiar exposition of *Gee agt. Pritchard* we refer, has remarked, that Lord ELDON, in that case, disclaimed any right to interfere by an injunction, upon the ground, either that the publication of the letters by the defendant would be a breach of confidence, or would tend to wound the feelings of the plaintiff. It is true, he expressly said, that he could exercise jurisdiction on no other ground than that of property in the plaintiff. But the property which he affirmed to exist, and held himself bound to protect, was that which Lord HARDWICKE, in *Pope agt. Curl*, had clearly defined—the property which in all cases remains in

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the writer of letters—the property with which he does not part on sending them to the person to whom they are addressed, and which, so long as they exist, entitles him to say that, without his consent, they shall not be published. The property of Mrs. Gee, which Lord ELDON meant to protect, was intellectual, not material, not her property in the paper on which her letters were written, but in the letters themselves, as the media of intercourse, conveying her thoughts and wishes to an absent person—as communications of facts, and of her sentiments and feelings. It was these which she did not choose should be exposed to the world; and it was to prevent this exposure, *as involving a violation of her property*, that the injunction was granted.

It is not meant to be denied that Lord ELDON, in the close of his opinion in *Gee agt. Pritchard*, does advert to the return of the letters by the defendant as a material fact; but he adverts to it not as a fact creating or establishing the plaintiff's title to relief, but as excluding a defence which might otherwise have been relied on as a bar to his granting it.

The defendant, it has already been said, claimed a right to publish the letters in vindication of his own conduct; and in reference to this claim Lord ELDON said, that although the defendant, as receiver of the letters, had a joint property in them, so long as he retained the possession, which might have justified his intended publication, yet that, by returning the letters, he had relinquished this property, and renounced any right of publication he might previously have had.*

Had it been possible for us, after a very careful examination of *Gee agt. Pritchard*, to entertain any doubts that the import and effect of the decision are such as we have stated, those doubts would probably have been yielded to the reasoning and authority of Mr. Justice STORY, who, with *an entire decision*, has adopted and acted upon the same construction. We refer

* Vice-Chancellor M'COUN, in *Wetmore agt. Scovill*, (3 *Edwards*, 515,) the case to which the above observations refer, was doubtless misled by the marginal note of Mr. Swanston, the reporter, which is certainly so expressed as to place the decision of Lord ELDON upon the sole ground of the return of the letters.

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not alone to his observations in his treatise on equity jurisprudence, (2 *Eq. Jur.*, §§ 945-948,) but also and principally to his elaborate judgment in *Folsom agt. Marsh*, (2 *Story R.*, p. 100,) in which the question of property in private letters distinctly arose, and with great care was considered and determined. In the opinion of this eminent judge, the whole doctrine relative to the rights of property in letters, and the jurisdiction of equity to restrain their publication, together with the limitations to which the doctrine is properly subject, is lucidly stated, and in language which, (with a few alterations,) as the final expression of our own views and convictions, we shall now adopt. We hold, then, "that the author of any letter or letters, and his representatives, whether they are literary compositions or familiar letters, or letters of business, possesses the sole and exclusive right of publishing the same, and that without his consent the letters cannot be published, either by the persons to whom they are addressed, or by any other. But, that, consistently with this exclusive right of the author, the person to whom the letters are addressed possesses, by implication, the right of publishing them upon occasions which require or justify the publication. Thus, he may justifiably use and publish them in a suit at law, or in equity, when such use is necessary or proper to maintain his action or defence. So, also, if he has been aspersed or misrepresented by the writer of the letters, or accused of improper conduct in a public manner, he may publish such parts of the letter or letters, and no more, as may be necessary to vindicate his character, and free him from unjust obloquy and reproach. But if he attempt to publish the letters, or any parts of them, against the wishes of the writer, and on occasions not justifiable, a court of equity will prevent the publication by an injunction, as a breach of that exclusive property in the letters which the writer retained." (2 *Story R.*, pp. 110, 111.)

To the weight and accumulation of the authorities which we have now cited and examined, there stand alone, opposed, two decisions in our own courts—that of Vice-Chancellor M'Coun, in *Wetmore agt. Scovill*, (3 *Edwards Ch. R.*, 515,) and of Chan-

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cellor WALWORTH, in *Hoyt* agt. *Mackenzie*, (3 Barb. Ch. R. p. 314,) and upon these all special comments have been rendered unnecessary by the remarks we have already made. It will be sufficient to say, that in each case an injunction was denied, upon the sole ground that the letters of which the publication against the will of the writer, and for very dishonorable purposes, was sought to be restrained, possessed no value for publication, and none "of the attributes—[such is the language employed]—of literary compositions." We must, indeed, regret that the learned judges, by whom these decisions were pronounced, adopted so entirely the speculative views of Vice-Chancellor PLUMER, as to deem themselves justified in acting upon the distinction which he invented, and of which no trace is to be found in any case prior or subsequent; but as we believe, for the reasons that have so fully been given, that in so doing they departed from the established law, we must decline to follow their example.

We think that we are bound to declare the law as laid down by Lord HARDWICKE, and followed by Lord APSLY, and clearly expounded, and most distinctly affirmed, by Lord ELDON, and last, not least, by our own STORY. And it is with no ordinary satisfaction that, in closing this discussion, we find ourselves in a condition to affirm that the rules of law relative to the publication of private letters, are in perfect harmony with those of social duty and sound morality, and, in the protection which they afford to individuals, consult and promote the highest interests of society.

We therefore decide that the plaintiff, upon the face of his complaint, and according to the established doctrines of equity, is entitled to the injunction for which he prayed, and on the terms in which it was originally granted.

We are also of opinion, that no justifiable cause has been shown by the defendants, Judd and McKay, for their intended publication of the plaintiff's letter, of which, by secret and unexplained means, the defendant, Judd, has obtained a copy.

The receiver of a letter may, indeed, publish it, when its publication is shown to be necessary for the vindication of his

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rights or conduct ; but this license has never been extended to a person whose possession of a letter, or of the copy of a letter, as acquired without the consent of the writer or receiver, is wholly unlawful : could this objection be removed, it does not appear that these defendants seek to publish the letter for the purposes of vindicating themselves. Their sole object, as we understand the affidavits, is to fix what they deem an odious imputation upon the character or conduct of the plaintiff. Their object is not defence, but accusation. To such a design a court of equity can lend no aid or countenance.

The injunction must, therefore, be continued, as to the defendants Judd and McKay, until a final hearing and decision. It must, however, be dissolved as to the other defendants, who have sworn that no copy of the letter is in their possession, and that they have no control over its publication.

The order appealed from must be modified accordingly. No costs are given to either party.

BOSWORTH, J., dissented.

SUPREME COURT

E. B. HOWARD & O. B. HOWARD agt. F. B. HOWARD.

The provisions of the Revised Statutes, in relation to the production of an authority of an attorney to commence an action of ejectment, apply to suits, under the Code, to recover land.

An agent of a person absent from the state, having power to see to his property and business here, and also to pay for and take a deed of, and take and hold possession of, and carry on and work a piece of land, for his principal, has no power to give authority to an attorney to commence a suit to recover such land.

But an instrument, executed by one of two joint owners of the land, for and in the names of himself and his co-tenant, (they being the plaintiffs in the suit,) recognizing the authority of the attorney to commence the suit and requesting him to continue it—the plaintiff executing the instrument, having been verbally directed and authorized by his absent co-plaintiff to do whatever was necessary in regard to the prosecution of the suit, is a sufficient recognition.

At Chambers, April, 1855.

R. S. HALE appeared upon an order for the production of the authority of the attorneys for the plaintiffs, to bring this suit in ejectment; and objected that the provisions of the Revised Statutes on the subject were repealed by the Code.

He also read an affidavit of D. W. Howard, that he was the "general agent" of the plaintiffs by parol appointment, "to see to their property and business" in this state. Also, that they instructed him to pay up a lease or contract for the land in question, and "take and deed, and take and hold possession" of it, and "manage and carry it on." It also appeared that D. H. W. had received a letter from the plaintiffs, requesting him to pay up for the land, and get "a deed, and go on and take possession of the land, and work it," till they came home. It appeared by the affidavits that the plaintiffs were in California.

On the day of the hearing of this matter, D. W. H. also gave the attorney for the plaintiffs a written authority in the names of the latter, as their agent, to prosecute the action, and also therein approved of the suit having been brought.

C. A. HAND, *contra*, insisted that the provisions of the Revised Statutes on this subject were still in force; and that no authority to commence the suit or sufficient recognition of such authority, had been shown.

HAND, Justice. I think the Code has not repealed the Revised Statutes, with regard to the production of the authority of the attorney to bring an action of ejectment. It contains nothing inconsistent with the precautions heretofore required; and, indeed, has no reference to the subject.

On the other point, a general agent to see to the property and business of his principal, and to take and hold possession, and manage and carry on a certain lot, is not authorized to employ an attorney to bring an ejectment.

The statute requires a written request to commence the suit,

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either by the plaintiff or his agent; or a written recognition of the authority of the attorney to do so. (2 R. S. 306.) It does not, at least in express terms, require that the authority of the agent shall also be in writing; but if that is not requisite, he should have authority in fact. It has been decided that a solicitor must have a special authority to commence a suit. (*Lord agt. Kellett*, 2 My. & K. 1. *And see Rogers agt. Cruger*, 7 Johns. R. 557; *Wilson agt. Wilson*, 1 J. & W. 437; *Wright agt. Castle*, 3 Meriv. 12; 1 Dan. Pr. 352; 2 Chit. Gen. Pr. 19; 3 *id.* 116.) Unless required by statute, such authority need not be in writing, though that is the safer practice.

But the retainer in this case was not sufficient, nor sufficiently proved. The power to do an act, comprises a power to do all such subordinate acts as are usually incident to, or necessary to effectuate the principal act. (*Pal. on Agency*, by *Dunl.*, 209.) But I cannot think an agency to see to property and business, with direction to take possession of a lot of land and work it, implies an authority to bring an action of ejectment. The plaintiffs' attorneys have not complied with the statute.

The agent of the plaintiff, however, swears that he has twice written for an authority, and for a recognition of the authority of the attorney to bring the suit, and that it was commenced in good faith, under the belief that he had an authority to do so; and he believes he will very soon receive a confirmation of his acts. The matter may be suspended a few days for that purpose.

At Essex Special Term, in March, 1855, the defendant having again moved the matter, the counsel for the plaintiffs produced an instrument, or writing, signed by one of the plaintiffs, for himself and his co-plaintiff, but dated after these proceedings were commenced, recognizing the authority of the attorneys to commence the suit, and requesting them to continue it. The same plaintiff also made an affidavit, wherein he stated that his co-plaintiff is still in California; that the plaintiffs are joint owners of the land in controversy; that both went to Cali-

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fornia in 1852; and that when the deponent left California, his co-plaintiff directed him to do whatever was necessary in regard to the prosecution of this action; and authorized him, as agent, to give any necessary authority therefor.

R. S. HALE, *for plaintiffs.*

B. POND, *for defendant.*

The judge held the recognition of the authority sufficient.

SUPREME COURT.

THE PEOPLE *ex rel.* WILLIAM WILLIAMS, plaintiff in error, agt.
REYNOLDS BIGELOW, defendant in error.

The *appeal*, given by the 351st section of the Code, is a mere substitute for the *certiorari* provided by the Revised Statutes for bringing up the judgments of justices' courts in civil actions, for review. (2 *Sand. S. C. R.* 634.)

The provisions of the Code have no application to the proceedings provided for by the 10th title, 8th chapter, part 3, of the Revised Statutes, (2 *R. S.* 512,) in relation to summary proceedings to recover the possession of lands, except the proceedings provided for in the 2d and 12th titles of that chapter. (1 *Selden*, 383.)

The term "*civil cases*," in the 351st section of the Code, (which provides for the review of justices' judgments,) is synonymous with the term "*actions*," as used in section one of the Code, in contradistinction to the term "*special proceedings*."

By the first section of the act of 1849, (*Sess. Laws*, 1849, p. 292,) the 28th section of the 10th title of chap. 8 of part 3, (2 *R. S.* 512, *supra*,) is so amended as to give justices of the peace concurrent jurisdiction with the other officers mentioned in that section, in *all cases* arising under it. The 5th section gives an *appeal* to the county court, for the purpose of removing the proceedings before justices of the peace under this title to the county court. And the decision of the county judge is to be an affirmance or reversal of the judgment of the justice, and to be *final*. The court has no power, upon a reversal of the justice's judgment, to restore a party to the possession of which he has been deprived by such erroneous judgment.

The remedy by *appeal* given by the act of 1849, and the writ of *certiorari* given

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by the 47th section of the 10th title of the Revised Statutes, are concurrent remedies, to which the party aggrieved may resort at his option in all cases. These summary proceedings are given, and the officer acquires jurisdiction between those only who stand in the *conventional* relation of *landlord and tenant*; and not between those who become such by operation of law; as in a contract for the conditional sale and purchase of real estate, where the purchaser makes default in payment, and, having possession, holds over after notice and demand. The relation of landlord and tenant must exist by a *lease* or *demise* of the property.

Geneva General Term, Sept., 1854.

Present, MARVIN, P. J.; BOWEN & GREENE, JJ.

THIS was a summary proceeding, instituted by the defendant in error, under the provisions of the 28th section of article 2 of the 18th title of chapter 8, part 3, of the Revised Statutes. (2 Vol., p. 512.)

On the 18th day of July, 1853, the defendant in error made an affidavit before J. C. PAUL, a justice of the peace, stating that on the 1st day of May, 1851, he let the plaintiff in error enter and take possession of the premises in question, by virtue of an agreement entered into between the parties on that day, by which the defendant in error agreed to convey the premises to the plaintiff in error when he should pay the sum of \$325, in several payments, the whole to be paid by the 15th day of May, 1853; and, in the meantime, the plaintiff in error to have the possession of the premises; but, in case of his failure to pay any of the payments mentioned in the agreement, the defendant in error had the right to declare the covenants therein contained void; that the plaintiff in error had failed to perform the covenants contained in the agreement, by neglecting to pay the sum due on the first day of May, 1853; that on the 10th day of June, 1853, the defendant in error declared the agreement void by a notice served for that purpose; that the plaintiff in error refused to pay the sum due on the contract, or any part thereof, and still held over and continued in possession of said premises, against the will and permission of defendant.

Upon this affidavit the justice issued a summons, commanding the plaintiff in error to remove from the premises forthwith, or show cause on the 20th day of July, 1853, why the posses-

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sion should not be delivered. The plaintiff in error failed to appear, and on the return day of the summons the justice gave judgment, that he be removed from the premises, and for costs, and issued a warrant for his removal accordingly. The plaintiff in error sued out a *certiorari*, and removed the proceedings into this court.

A. SAWIN, *for plaintiff in error.*

W. C. JOHNSON, *for defendant in error.*

By the court—GREENE, Justice. It is insisted by the defendant in error, that the writ of *certiorari* given by § 47 of the landlord and tenant act, (2 R. S., p. 516,) for the purpose of reviewing proceedings under that statute, is superseded by the 351st section of the Code, and that the 2d sub. of the 5th section of chapter 198 of the laws of 1849, (*Sess. L.*, p. 292,) provides a remedy in place of that writ in such cases. By the last section it is provided that the proceedings before a justice of the peace, upon whom jurisdiction is conferred in such cases, *may* be removed by appeal to the county court of the county, in the same manner, and with the like effect, and upon like security, as appeals from the judgments of justices of the peace in civil actions, except that the decision of such county judge shall be an affirmance or reversal of such judgment, and shall be final.

It is further provided by this section, that in case of such appeal, in order to stay the issuing of such warrant or execution, the tenant, in case of an appeal by him, shall give security for the payment of all rent accruing or to accrue upon said premises subsequent to the said application to said justice.

The appeal given by the 351st section of the Code, is a mere substitute for the *certiorari* provided by the Revised Statutes, for bringing up the judgments of justices' courts in civil actions, for review. (*Whitney agt. Bayard*, 2 Sand. S. C. R. 634.) The provisions of the Code have no application to the proceedings provided for by chapter 8 of the 3d part of the Revised Statutes, (by which the proceedings in question are given,) except the

proceedings provided for in the 2d and 12th titles of that chapter. (1 *Selden's Rep.* 388.)

The term "*civil cases*," in the 351st section of the Code, is synonymous with the term "actions," as used in § 1 of the Code, in contradistinction to the term "special proceedings." This construction is rendered still more apparent by the act of 1849, the 5th section of which, so far as it provides for an appeal from the judgments or determinations of justices of the peace in these proceedings, was wholly unnecessary, if the 351st section of the Code was applicable to these proceedings. That section provides that all statutes then in force, providing for the review of judgments in civil cases, rendered by courts of justices of the peace, &c., and regulating the practice in relation to such review, are repealed; and that, "hereafter, the only mode of reviewing such judgments shall be by an appeal, *as prescribed by this chapter*." If this section had been applicable to these proceedings, there was certainly no need of making further provision for the review of the decisions of justices of the peace, in such cases, in the act of 1849—which gave them jurisdiction over these proceedings. If the provisions of the Code were applicable at all, they gave a perfect remedy, without further legislation.

The next question is as to the effect of the act of 1849. By the first section of that act, the 28th section of the 10th title of chapter 8 of the 3d part of the Revised Statutes is so amended as to give justices of the peace concurrent jurisdiction with the other officers mentioned in that section, in *all cases* arising under it.

I have already referred to the provisions of the 5th section, giving an appeal to the county court, for the purpose of removing the proceedings before justices of the peace under this title to the county court. By the 47th section of title 10, it is provided that the supreme court may award a *certiorari*, for the purpose of examining any adjudication made on any application thereby authorized; but the proceedings made on such application shall not be stayed or suspended by such writ, or any other writ or order of any court or officer.

The 48th section provides, that whenever such proceedings shall be reviewed by the supreme court, the court may award restitution to the party injured.

By the Revised Statutes, no security is required of the party prosecuting the writ of *certiorari*; and no stay of proceedings is given; but restitution is awarded to the tenant upon a reversal of the proceedings.

By the act of 1849, the party appealing is to give security for the costs of the appeal in every case; and if the tenant desires a stay of proceedings, he must give security for the payment of the rent; and the decision of the county judge is to be an affirmance or reversal of the judgment of the justice, and to be final. The court has no power, upon a reversal of the justices judgment, to restore a party to the possession, of which he has been deprived by such erroneous judgment.

The practical consequence of the construction contended for by the defendant in error is, that a party, aggrieved by an erroneous judgment of a justice, who is unable to give the security required for a stay of proceedings, must submit to the judgment.

There can be no question that this writ lies to review and correct these proceedings, when taken before any other officer than a justice of the peace. Those officers, as we have seen, have jurisdiction in all cases arising under the 28th section of title 10. And I see nothing in either statute requiring a construction that would make the remedy of the aggrieved party, by review in the same class of cases depend upon the officer before whom the proceedings were commenced. On the contrary, I think the remedy by appeal given by the act of 1849, and the writ of *certiorari* given by the 47th section of the 10th title of the Revised Statutes, are concurrent remedies, to which the party aggrieved may resort at his option in all cases.

The next question is as to the sufficiency of the affidavit to give the justice jurisdiction of this proceeding. The case made by the affidavit is simply this:—The parties entered into a contract, by which the defendant in error agreed to sell the premises in question to the plaintiff in error, and to convey them,

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upon his paying the stipulated purchase money according to the terms of the contract. The plaintiff in error to have possession of the premises, and the defendant in error to have the right to rescind the contract upon default of payment. The plaintiff in error made default in his payments, and the defendant in error gave him notice that he should consider the contract at an end.

The affidavit states that the plaintiff in error refuses to pay the purchase money, and remains in possession, or holds over, without the permission, and against the will, of the defendant in error.

On this state of facts there is not even a colorable pretence for treating Williams as the tenant of Bigelow, within the meaning of that term as used in the statute. These summary proceedings are given between those only who stand in the *conventional* relation of landlord and tenant, and not between those who become such by operation of law, except in the cases specially provided for, and specified in the statute.

That part of the statute under which these proceedings were commenced, "only extends to cases where the relation of landlord and tenant has been created by a lease or demise of the property." (*Per* BRONSON, J., in *Sims* agt. *Humphrey*, 4 *Denio*, 185; *Roach* agt. *Cosine*, 9 *Wend.* 227; *Evertson* agt. *Sutton*, 5 *Wend.* 281.) In this respect, the affidavit was wholly insufficient to give the justice jurisdiction.

The judgment of the justice should, therefore, be reversed, and restitution should be awarded to the plaintiff in error.

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SUPREME COURT.

THE PEOPLE *ex rel.* THE ARGYLE and FORT EDWARD PLANK ROAD COMPANY agt. THE COMMISSIONERS OF HIGHWAYS OF THE TOWN OF FORT EDWARD.

A *return* to an *alternative writ of mandamus* may either deny the facts stated in the writ on which the claim of the relator is founded, or may state other facts in law sufficient to defeat the relator's claim.

An objection that a writ of mandamus is not made returnable at *special term*, will not be allowed after the *return has been made*.

A return alleging that the law, under which the relief is claimed in the writ, is *unconstitutional* and *void*, is not a *fact*, but an averment of a principle of law, arising upon the face of the return. It must be stricken out.

Where a portion of a return to an alternative mandamus is alleged to be immaterial or argumentative, the remedy is not by demurrer, but by motion to strike out.

Washington Special Term, Sept., 1854.

MOTION to strike out parts of the return to an alternative mandamus. So much of the return as it is necessary to state, will be found in the opinion of the court.

A. D. WAIT, *for relators.*

N. G. PARIS, *for defendants.*

C. L. ALLEN, Justice. I had been led to the conclusion that, under § 471 of the Code, all proceedings in relation to writs of mandamus, and the returns thereto, were excepted from the provisions of § 160 of the Code. But the case of *The People agt. Ransom* (2 Com. 496) decides, that if the return contains anything more than a full answer to the mandamus, it may be rejected as surplusage, or struck out on motion. The motion under that decision is, therefore, properly made.

If the defendants make a return to the alternative writ, they may either deny the facts stated in the writ on which the claim of the relator is founded, or they may state other facts in law sufficient to defeat the relator's claim. (*People agt. Supervisors of Fulton*, 16 Barb. 52; 8 How. 358.)

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Objection was taken, on the argument, to the form of the writ—that it should have been made returnable at a special term of the court. This was so decided in the case of *The People agt. Supervisors of Greene*, (12 *Barbour*, 217.) But the defendants have chosen to make a return, and place it on the files of the court, without interposing that objection, or moving to set aside or quash the writ. I think they are too late in making the objection after the return; and that, at all events, an amendment may be made, if desired, making the writ returnable at special term. (*Code*, § 173.)

1. The first part of the return, which the relators ask to have stricken out, is the allegation that the law under which the relief is claimed is unconstitutional and void. This is not a *fact*, but an *argument*, or an *averment* of a principle of law arising upon the face of the writ, or the return. It is improper, and must be stricken out.

2. I think the second portion of the return, proposed to be stricken out, is immaterial, and part of it is argumentative.

If the relators were entitled to the relief which they claim, at the time the application was made, the defendants could not deprive them of that right by any subsequent act; nor would such subsequent act excuse them from the performance of their duty. It is a question yet to be determined, whether the act of assessing all the property in the proper road districts, as set up in the return, and which the defendants had done in the performance of their duty, did not place it beyond their power to comply with the terms of the application, even if they were bound to accede to them. It must appear that defendants yet have it in their power to perform the duty required of them: for if they have not such power, the court will refuse the writ as vain and fruitless. (*The People agt. Supervisors of Greene*, 52 *Barb.* 217; *and see* 16 *Barb.* 52; 15 *id.* 607.)

On these important questions, I pass no opinion at this time. But the portion of the return which I am now examining, will afford the court no aid in arriving at a conclusion upon them. It must be stricken out.

3. For similar reasons the third portion of the return, ob-

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jected to, must also be stricken out. It is immaterial that the stock is mostly owned by persons residing in Argyle. The detail of a conversation with Pratt, the applicant, is a statement of the evidence which may be relied on in support of some fact, and is improperly put into the return. So the statement of the amount of tolls received, and of the cost of the road, is immaterial.

The latter part seems to be the brief and argument of the defendants, and which will be more properly set out in the points, to be handed to the court hereafter, than in the return.

The motion must be granted; but, as the practice has been somewhat unsettled,—I having decided myself in a recent case, and before I saw the decision in 2 *Comstock*, that the only remedy was by demurrer, or plea,—I shall let \$10 costs of the motion abide the event.

Order accordingly.

SUPREME COURT.

JAMES PATTERSON, respondent, agt. MARTIN L. GRAVES,
appellant.

The Code (§ 272) does not require a referee formally to report upon the issues formed by the pleadings. If there are issues upon which there is no evidence, he is not required to notice them. And where an issue is reported upon by necessary implication, from the rest of the report, it will be deemed sufficient. He is not to report the *evidence*, but the *facts* found from the evidence. But where evidence is introduced upon a material issue, and the facts are not affirmatively found thereon, he is not required to report negatively upon it; it is sufficient that he find *affirmatively* what facts are proved.

A *delay* of about seven months, in making a motion to set aside a report of a referee for irregularity, although it was claimed that a substantial right was involved, *held*, fatal to the motion.

Genesee General Term, September, 1854.

Before MARVIN, P. J., MULLETT and BOWEN, Justices.

APPEAL by defendant from an order of the special term, denying a motion made by the defendant to set aside the referee's

report for irregularity, or that the referee amend his report. The irregularity complained of is, that the report does not set forth "the material facts found upon the issues passed upon by the referee, or what issues he did pass upon, or what facts he did find, on the evidence taken, on the issues he did pass upon."

The facts are sufficiently stated in the opinion.

W. H. GREENE, *for appellant.*

• A. THORN, *for respondent.*

By the court—BOWEN, Justice. The pleadings in the cause were not furnished to the court on the argument of the motion, and the only information we have, of what the issues were on which the action was tried by the referee, is contained in the affidavit on which the motion was made. From this affidavit it appears that the plaintiff's demand was for the rent of certain lands described in the complaint, accruing from May 28, 1849, to July, 1850, at \$40 per annum—the plaintiff suing as the assignee of S. G. Havens, the landlord. That the answer denied the allegations of the complaint, and set up that the defendant occupied the lands in question as the owner thereof until May 2d, 1848, when Mr. Havens purchased them on the foreclosure of a mortgage made by the defendant, and from that time he occupied them as a tenant at will of Mr. Havens, until April 13th, 1849, when he was served with a notice to quit by his landlord, and he then surrendered the possession, and had not occupied the premises after that time. That, February 12th, 1848, one Johnson became the owner of a piece of land adjoining the demised premises, on which there was a dwelling-house, which the defendant occupied; and that, May 1, 1850, the defendant became the owner thereof, by a conveyance from Johnson. "That the only question is, whether the dwelling-house, which said Graves did use and occupy, was on the latter or former premises; and if upon the former, how much of them it covered. That Graves had occupied and used the said dwelling-house as the owner in fee. That the answer further set up payment."

The referee, by his report, finds that the defendant used and occupied the land described in the complaint, under Mr. Havens as his landlord, from June 1st, 1848, to August 1st, 1850, and that such use was worth \$45 per annum; and that the rent had been assigned to the plaintiff. That the dwelling-house was on the demised premises, and not on the land conveyed by Johnson to the defendant. That there was due from the defendant to the plaintiff, for such use, after deducting all payments and offsets, \$33.75—and judgment was ordered for that sum.

It will thus be seen that the referee did, substantially, report upon all the issues found by the pleadings. He formally and technically reported upon them all, except that of payment; and he did upon that issue by necessary implication. If there was due, on account of the rent, \$33.75 over all payments, it necessarily follows that it was not all paid.

The Code (§ 272) requires the referee to state in his report the facts found by him, and his conclusions of law. I do not understand that this provision requires him formally to report upon the issues formed by the pleadings. If there are issues on which there is no evidence, I do not think he is required to notice them in his report. He is to report the facts found by him: that is, the facts which the evidence before him proves. He should not report the evidence; that was not intended, and should be avoided. If evidence was introduced before the referee upon some material issue, and he has not by his report found the affirmative thereof as proved, and either party claims that he should have so found from the evidence, I am inclined to think that a case setting forth the evidence would, on appeal, present the question whether the report, in that respect, was against evidence, without the referee's stating in his report negatively that he did not so find. That it is sufficient for him to find affirmatively what facts are proved. The case of *Van Steenburgh agt. Hoffman*, (6 How. Pr. R. 492,) does not establish a different doctrine.

But that question is not before the court on this appeal, for,

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as stated above, all the facts at issue between the parties are substantially passed upon by the referee in his report.

I think that the delay of the defendant in making the motion is a perfect answer to it. The motion was to set aside the report for irregularity. The defect therein complained of would, if it existed, constitute a mere irregularity; and it is unnecessary to cite authorities to show that motions founded on irregularity must be made the first opportunity. But if, as was claimed by the defendant's counsel on the argument, the defect was a substantial one—affected a substantial right—I do not think that is an answer to the delay.

The right to appeal to the general term is a substantial right, yet the Code requires it to be taken within thirty days after notice of judgment or order to be appealed from, or the substantial right is lost. There is no statute, nor standing rule of the court, prescribing the time within which such a motion as this must be made; but the practice of the court and the policy of the law require that it be done promptly.

The referee's report is dated October 1st, 1853, and a copy thereof was served on the defendant's attorney, October 11th, 1853. The affidavit on which the motion was based was not made until May 4th, 1854. Nearly seven months elapsed after the defendant knew, or should have known, of the defect in the report, before any move was made to have it corrected—during which time several special terms intervened, at which the motion might have been made.

The order appealed from should be affirmed, with \$10 costs.

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NEW-YORK COMMON PLEAS.

SAMUEL ABERHALL agt. PHILIP ROACH.

An adjournment of a cause for ten days, after trial commenced, by a justice of the peace, without the defendant's consent, is without authority, and renders the further proceedings *void*.

General Term, October, 1854.

THE facts sufficiently appear from the opinion of the court.

I. T. WILLIAMS, *for defendant*.CHAUNCEY SHAFFER, *for plaintiff*.

By the court—INGRAHAM, F. J. This action was for damages occasioned by negligently driving against the plaintiff's wagon. A question was put to a witness, whether the plaintiff hired another horse? which was admitted under exception. No special damages were claimed in the complaint.

This question should not have been allowed. It was immaterial. It neither tended to show the defendant's negligence, nor the injury to the plaintiff's property.

It is suggested that it is no ground of objection, because it is proven that the plaintiff's horse was useless for a week, and therefore the answer could have no bearing on the mind of the justice in rendering judgment. This is not very clear. He may have increased the damages for this reason, and, if so, it had an improper influence.

The justice, after commencing the trial on the 14th of April, adjourned, by consent, to the 20th, and again to the 28th of April. On that day the plaintiff applied for a further adjournment, on account of the absence of a witness duly subpoenaed, which was opposed by the defendant, and the justice adjourned

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the cause to the 11th of May. This adjournment was without authority, and rendered the further proceedings void.

We have heretofore held, that an adjournment by the justice for ten days, without the defendant's consent, was unauthorized. (*Redfield agt. Florence, January Gen. Term, 1854.*) If such a power cannot be exercised before trial, there can be no possible reason for sustaining it after the trial has commenced. It is against the whole theory of the laws organizing these courts, which contemplate a speedy trial of causes pending therein. If a witness, duly subpoenaed, does not appear, an attachment should be issued, and the trial not be commenced until the attachment is returned; after it has been commenced, there is no propriety in such an adjournment. I doubt whether an instance can be found, even in a court of record, where the court has adjourned a cause half tried, to procure the attendance of a witness, without the consent of both the parties. In a justice's court no such power exists.

Judgment reversed.

SUPERIOR COURT.

HYSLOP agt. RANDALL.

A cause of action for a *mere tort*, in no way affecting property, cannot be so assigned that the assignee can sue in his own name.

The defendant, as the complaint alleged, falsely and fraudulently represented to *A.*, that *B. & C.* were worthy of credit: *A.*, relying thereon, sold goods to *B. & C.*, on credit, and was damaged thereby, and assigned the cause of action to the plaintiff. On demurrer to the complaint, *held*, that no action would lie in the plaintiff's name.

Special Term, April, 1855.

THIS cause came before the court on a demurrer to the complaint. The latter alleged that the defendant, to induce *A.*, a merchant, to sell goods on credit to *B. & C.*, also merchants, falsely and fraudulently represented them to be responsible, worthy of credit, and safe to be trusted; a sale and delivery of goods on credit to *B. & C.*, relying thereon; that *B. & C.* were not responsible, or worthy of credit, or safe to be trusted; and their failure and inability to pay, whereby *A.* sustained damage; and a sale and assignment to the plaintiff of the cause of action against the defendant, arising from these false and fraudulent representations.

The defendant demurred to the complaint, and assigned for cause, that it did not state facts sufficient to constitute a cause of action; that the pretended cause of action could not be assigned, so as to give the assignee a right to sue in his own name.

WM. C. BARRETT, *for plaintiff.*

CHAS. H. HUNT, *for defendant.*

BOSWORTH, Justice. Section 111 of the Code requires every action to be prosecuted in the name of the real party in interest. But it also declares that such section "shall not be deemed to

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authorize the assignment of a thing in action *not arising out of contract.*"

This section was designed, not only to authorize, but to require, all causes of action which the law had recognized as proper subjects of sale and assignment, to be prosecuted in the name of the assignee.

It of course includes all such causes of action as arise upon contracts not negotiable. Formerly they must have been prosecuted in the name of the assignor. As to all such cases, the courts would protect the assignee against any contracts affecting them, made between the assignor and his debtor, after the latter had notice of the assignment.

To what extent causes of action, not arising out of contract merely, but out of actual injuries to property, may be assigned, so that the assignee may sue upon them in his own name, has been a vexed question since the Code took effect.

In *Hoyt agt. Thompson*, (1 Seld. 347,) PAIGE, J., says that "all choses in action, embracing demands which are considered as matters of *property* or *estate*, are now assignable at law or in equity. Nothing is excluded but mere personal torts, which die with the party. A claim, therefore, for *property* fraudulently taken or received, or wrongfully withheld, and even for an *injury* to either real or personal property, may be assigned." But as to this question, as well as to some others discussed by him, he distinctly states that he does not understand any of his brethren, except the chief judge, as expressing any opinion. (*Id.* 357.)

This opinion, therefore, however great the respect to which it is entitled, is but the opinion of a single judge, and was *obiter dictum*.

In *Hall agt. Robinson*, (2 Coms. 293,) the decision was put on the ground that the property had not been *converted* by the defendant, when the plaintiff's vendor sold it to him. That a sale of it to the plaintiff while in the actual possession of the defendant, gave to the former a good title, and that, upon a demand of it, made after his purchase, and a refusal by the defendant to deliver it, an action could be maintained.

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With reference to such a case, STORY, J., says, "I know of no principle of law that establishes that a sale of personal goods is invalid because they are not in the possession of the rightful owner, but are withheld by a wrongdoer. The sale is not, under such circumstances, the sale of a *right in action*, but is the sale of the *thing itself*, and good to pass the title against every person, not holding the same under a *bona fide* title, for a valuable consideration without notice; and *a fortiori* against a wrongdoer." (2 Sum. R. 206-211, *The brig Sarah Ann*.) On this point see Gardner agt. Adams, (12 Wend. 297.)

Mr. Justice PAIGE does not rest his opinion upon the idea that the Code has enlarged the class of assignable actions, but bases it upon the rules of law and equity as they existed before the Code was passed. All the assignments in that case were made before the Code was enacted. The only authority cited by him, is *The People* agt. *Tioga Common Pleas*, (19 Wend. 73.)

In the latter case, the learned judge who delivered the opinion said, "I have not been able to find any case, in England, which, in respect to personal estate, has given the assignees a greater right than would go to an executor: none which vests in them a right of action for a personal tort, or indeed for *any mere tort*; while there are several cases in *Pennsylvania* which deny that such a right will pass." (*Id.* pp. 76, 77.) An action on a penal statute, and an action on the case for a *deceit*, are instanced as actions which do not survive. (*Shoemaker* agt. *Kelley*, 2 Dall. 213.)

But an executor or administrator may maintain actions on account of transactions of the testator or intestate in his lifetime, which the latter could not do if living.

If a person disposes of property with intent to defraud his creditors, the transfer is good as against himself, and he cannot avoid it. It is difficult to understand on what principle his volunteer assignee could maintain an action to rescind the sale and reclaim the property. Yet his executor or administrator may impeach the sale and reclaim the property, or recover its value. (*Bate* agt. *Graham*, 1 Kernan, 240.)

It, therefore, may not be accurate to say that all causes of

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action arising out of transactions connected with personal property, which would accrue to an executor on the death of his testator, may be assigned by the latter, while living, with such effect that the assignee can sue and recover in his own name.

The cause of action stated in this complaint is one of *mere tort*, not injuriously affecting any property, personal or real. It may have induced a contract, not with the defendant, but with others. It does not arise out of contract. The claim, for the goods sold, still continues, unless it is outlawed. But they were not sold to the defendant. He received no property from the plaintiff's assignor, nor the proceeds of any property owned by him, nor did he physically injure any such property.

What he did was a pure naked tort, in no way affecting any specific property. I do not think the assignee of such a cause of action can prosecute in his own name.

The plaintiff has not, therefore, stated facts enough to show a cause of action existing in his favor against the defendant, on which he can maintain an action.

Judgment must be given for the defendant.

SUPREME COURT.

ROYALL E. ROBBINS and HENRY A. ROBBINS agt. ISAAC
ALEXANDER.

A deed of compromise and settlement executed, under seal, by judgment and other creditors, with a covenant not to sue or molest the debtor or his property, he paying a certain per cent. on the amount of his debts,—*held*, not to affect the amount of *costs* in a judgment signed off by the plaintiffs as such judgment creditors, where there was a previous agreement that the plaintiffs' *attorney* should have the costs in the suit as a recompense for his services, of which the defendant, the debtor, had notice.

A refusal by the plaintiffs, when compromising, to settle as to such costs, *held*, to be a severance of the costs from the rest of the debt recovered by the judgment, so that the plaintiffs' attorney owned the costs, and the plaintiffs the rest of the debt only.

Robbins agt. Alexander.

New-York Special Term, March, 1855.

THIS was a motion made in two causes by the defendant, Isaac Alexander, to set aside two executions issued upon two judgments in favor of the plaintiffs against said defendant.

It appeared that in October, 1851, the plaintiffs recovered two judgments, in the supreme court, against the defendant: the first for \$380.66, the second for \$379.12. The defendant stated that the plaintiffs entered into and executed an agreement with him—[setting out a copy]—settling and compromising the said judgments, and the claims and the moneys due thereon; that he then and there paid to the plaintiffs the amount required by said agreement, and they accepted the same as full satisfaction.

That in December, 1854, the plaintiffs, by their attorney, Daniel Bowley, issued execution on each of said judgments, to the sheriff of the county of New-York, directing said sheriff to levy upon the first judgment \$153.78, and upon the second the sum of \$143.89. That under said executions the sheriff had levied upon the property and stock in trade of defendant, and threatened, and was about to remove it for sale.

The substantial part of the deed of compromise run as follows:—

“Now know ye, that we, the said creditors of the said Isaac Alexander, in consideration of the premises and of one dollar, and other considerations, to each of us in hand paid, do, for ourselves respectively and severally, and for our respective and several executors, administrators, and assigns, covenant, promise, compound, and agree to and with the said Isaac Alexander, his executors, and administrators, that we, the said several creditors, shall and will accept and receive, and hereby do accept and receive, from the said Isaac Alexander, for each and every dollar that the said Isaac Alexander doth owe and is indebted unto us respectively, the sum of ten cents, in full discharge and satisfaction of such several debts and claims.

“And we, the said several creditors, do severally and respectively, for ourselves, our several and respective executors,

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administrators, and assigns, in consideration of the premises, further grant, promise, and agree to and with Isaac Alexander, that neither we, the said several creditors, nor any of us, nor the executors, administrators, or assigns of us, or any or either of us, shall or will, at any time hereafter, sue, arrest, molest, trouble, imprison, or attach the said Isaac Alexander, his executors or administrators, or his or their goods, chattels, or property, for any debt or other existing claim or demand now due, or owing to us, or any of us, his creditors as aforesaid. In witness, &c.

“March 3, 1854.”

[Signed and sealed.]

It appeared, on the part of the plaintiffs in the execution, by the affidavit of their attorney, Daniel Bowley, and of the plaintiff Henry A. Robbins, corroborated by the plaintiff Royall E. Robbins, that the attorney agreed with the plaintiffs to prosecute the actions for the costs thereof as against the defendant. And the plaintiffs agreed with the attorney, upon the commencement of the actions, that the costs should belong to the attorney; and that the portions of the judgments therein for costs did then belong to the attorney pursuant to said agreement. That the defendant was distinctly informed that such costs belonged to the attorney, by the attorney himself, about six months previous to the execution of the deed of compromise. And the said Henry A. Robbins, at the time of the compromise, told the defendant that the plaintiffs could not settle with him as to said costs; that they did not know the amount of Mr. Bowley's claim for costs; that the plaintiffs would receive a hundred dollars as a satisfaction of the original debt; that he told defendant that he would rather not sign the release without seeing Mr. Bowley, (who was then absent;) that defendant said, “Leave the amount blank,” which was accordingly done.

The defendant denied, in the most positive manner, that Bowley, at any time, ever informed him, or gave him to understand, or intimated to him, that any part of said judgments, either for costs or otherwise, belonged to him, said Bowley, or

- that he had any personal interest therein to any amount what-

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ever. That defendant never heard, from any source, or in any way at any time, until the affidavit was made by said Bowley, in December, 1854, that said Bowley made any such claim. That the plaintiffs, at the time of the compromise, told defendant, if he would pay them \$100 they would release him; that defendant paid them \$100 in gold, and one of them signed the release, in the presence of the other, for both. Defendant requested them to fill up the amount opposite their names, and one of the plaintiffs then, for the first time, mentioned the word lawyer or attorney; and said their lawyer was absent from the city, and had all the papers, and he could not tell the amount, but as soon as he returned he would give the defendant up the notes sued on. Defendant positively denied that, at that time, the plaintiffs, or either of them, said or intimated that they could not settle with him as to said costs, or any costs in said judgments. That the plaintiffs expressly affirmed, before signing their names to the compromise, that, on payment of the \$100, they would release him from all demands.

The affidavit of H. H. Hunter, a clerk in the office of the defendant's attorney, stated that, in April, 1854, he called on the plaintiffs to get satisfaction pieces of said judgments. One of the plaintiffs said, if he would call the next day (being then very busy) he would sign said satisfaction pieces; and said plaintiff expressed himself satisfied with the compromise with defendant, and said he would sign the satisfaction pieces with pleasure—that they had gotten much more than they ever expected to. On again calling for the execution of said satisfaction pieces, the plaintiffs declined until their attorney should see them, and say they were correct.

The plaintiffs denied the statement made by Hunter, that they ever expressed themselves satisfied with the compromise, and would execute the satisfaction pieces with pleasure, &c.

The affidavits on the motion were very conflicting.

ALBERT MATHEWS, *for motion*, said,

First. The release is valid on its face, as a discharge of the judgments.

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1. Covenant not to sue (under seal) operates as a release, to avoid circuity of action. (*Cuyler agt. Cuyler*, 2 Johns. 186.)

It is fraud on other creditors to sue. (*Crowley agt. Hillery, Maule & S.*, 120.)

So a covenant to indemnify against debt. (*Clark agt. Bush*, 3 Cow. 151; *Phelps agt. Johnson*, 8 Johns. 43.)

2. An agreement by a creditor, under an arrangement with other creditors, to compromise a debt for part payment, is good not under seal—the agreement of the other creditors being a good consideration. (*Alchin agt. Hopkins*, 1 Bing. N. C. 99, 102; *Good agt. Cheeseman*, 2 B. & A. 328.)

3. It is not necessary to set opposite the name of a creditor the amount of his debts, although the agreement says, “their debts set opposite their names,” &c. (*Harriady agt. Wall*, 1 B. & Ald. 103; 2 Stark. 198; *King agt. Smith*, 4 Car. & P. 108.)

4. A debt of record, as a judgment, may be released by sealed instrument. (*Parke BARON, Barber agt. St. Jurntain*, 12 Mees. & Wels. 452; *recognized*, 4 Denio, 416; *West agt. Blake-man*, 2 Scott's New Rep. 199.)

5. A release by one of two or more joint debtors, though upon nominal consideration, and intended only to discharge the one, releases all. (*The Bank of Poughkeepsie agt. Ibbotson*, 5 Hill, 460; *Hoffman agt. Dunlop*, 1 Barb. S. C. R. 186; *Stitt agt. Cass*, 4 id. 92.)

6. So by one member of a firm, &c., under seal. (*Pierson agt. Hooker*, 3 John. R. 68; 19 John. R. 143; *King agt. Smith*, 4 Car. & Paine, 108.)

Second. Parol evidence is inadmissible to vary the legal effect of either the release or the record. (*Van Brunt agt. Van Brunt*, 3 Edw. V. C. R. 14; *Russell agt. Rogers*, 10 Wend. 479; *Holmes agt. Viner*, 1 Esp. R. 131; *Pierson & Hooker*, 3 Johns. R. 68.)

Third. The alleged sub-contract of the attorney with his client, did not sever the obligation of the judgment against the defendant. So far as he was concerned, the plaintiffs were his sole creditors, and the defendant might so treat them, and their release was valid to discharge the whole judgment. (*Aus-*

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tin agt. *Hall*, 13 *Johns. R.* 286; *Bronson* agt. *Fitzhugh*, 1 *Hill*, 185; *Decke* agt. *Livingstone*, 15 *Johns.* 479; *Gibson* agt. *Winter*, 5 *B. & Ald.* 96.)

Fourth. The affidavits of the parties being conflicting, the plaintiff should be left to the remedy by action, or an issue awarded to a jury. (*Dresser* agt. *Shufelt*, 7 *How. P. R.* 85; *Timon* agt. *Leland*, 6 *Hill*, 237.)

LORENZO B. SHEPHERD, *opposed.*

MITCHELL, Justice. The affidavit of Mr. Bowley, the plaintiff's attorney, and of Henry A. Robbins, one of the plaintiffs, are positive, that by arrangement between the plaintiffs and their attorney, before the suits were commenced, the costs to be recovered were to belong to the attorney. Mr. Bowley also swears, that after judgment was obtained, and before he went abroad, he told the defendant, I. Alexander, that the costs belonged to him alone; and H. A. Robbins swears, that when the release was executed by him to the defendant, he stated to the defendant that the attorney was absent, and he did not know the amount of his costs, and could not settle with the defendant as to them.

The defendant denies that Mr. Bowley ever told him this, or that Mr. Robbins made such a statement; but the burden of proof is against him.

The release, as it is called, is under seal, and is a composition signed by the creditors of Alexander, and, among others, by the plaintiffs. The amounts are usually set opposite to the creditors' names; but no amount is set opposite to the plaintiffs' signatures, except one in lead-pencil, which, it was admitted, was placed there after the release was executed.

The judgments were for \$380.66 and \$379.12, including in the two \$209.67 for costs.

The plaintiffs' attorney has issued executions, directing the sheriff to levy for his costs only, and the defendant moves to set aside the executions.

The release is, in fact, a covenant not to sue or molest the

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defendant, he agreeing to pay ten per cent., and is by each creditor, "for any debt, claim, or demand now due or owing to us, or any of us, his creditors."

The agreement between the plaintiffs and their attorney, that he should have the costs in the suit, as his recompense for his labor, and the communication to the defendant, that the costs belonged to the attorney, and the refusal of the plaintiffs, when compromising, to settle as to those costs, were a severance of the costs from the rest of the debt recovered by the judgments, so that the plaintiffs' attorney owned the costs, and the plaintiffs the rest of the debt only.

The covenant of the plaintiffs, not to sue for any debt, claim, or demand due or owing to them, did not, under these circumstances, include the costs which thus belonged to their attorney, and not to them.

The motion to set aside the executions is denied without costs, and without prejudice to the defendants moving for a re-taxation of the costs.

He says, the judgment was obtained by default without a trial. If by that is meant, without the cause being on the calendar for trial, and it be true, there must be a great error in the costs.

SUPREME COURT.

GEORGE W. DRAKE agt. EDWARD WAKEFIELD.

An action to recover possession of personal property can be maintained where the defendant has divested himself of the possession and control of the property before suit brought; and that, too, as well where a wrongful *taking*, as where a wrongful detention only is complained of. (See *Roberts agt. Randel*, 5 *How. Pr. R.* 327, and 3 *Sand S. C. R.* 707; *Brockway agt. Burnap*, 12 *Barb.* 347; and *Elwood agt. Smith*, 9 *How. Pr. R.* 525, *adverse*; and 5 *How. Pr. R.* 145; *Brockway agt. Burnap*, 16 *Barb.* 309, *in accordance with this case.*)

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Erie Special Term, August, 1854.

MOTION by defendant for a new trial on a case.

The complaint charges that the plaintiff, being the owner and in possession of a yoke of oxen, the defendant wrongfully took and retains them. That, although the plaintiff has demanded possession thereof, &c., the defendant has refused, and yet refuses, to deliver them to the plaintiff, and demands judgment for the delivery thereof to the plaintiff, and damages for the detention.

The answer denies generally the allegations of the complaint, and sets up property in the defendant.

The action was tried at the Chautauque circuit in June, 1854.

On the trial, the plaintiff gave evidence tending to show that he owned the oxen, and that they were wrongfully taken from his possession by the defendant. He also proved a demand and refusal after the alleged taking, and while the oxen were in the defendant's possession.

The defendant offered to prove that, at the time the action was commenced, he had sold and delivered the oxen to one Medley, and had not then the actual possession of, nor any right to or control over them, which was objected to by the plaintiff on the following grounds:—1st. The taking was wrongful, and either trespass or replevin would lie. 2d. No such matter was set up in the answer. 3d. It was immaterial to the issue.

The objection was sustained by the court, and the defendant excepted. The jury found for the plaintiff, assessing the value of the oxen and the damages for the detention. The defendant made a case, and now moves thereon for a new trial; and the only point made on the motion is as to the correctness of the ruling at the circuit, rejecting the evidence offered.

H. W. HARRINGTON, *for defenaant.*

WEEDEN & HENDERSON, *for plaintiff.*

BOWEN, Justice. In *Roberts* agt. *Randel*, (reported 5 *Hou. Pr. R.* 327, and 3 *Sandf. S. C. R.* 707,) the superior court of

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the city of New-York, at a general term, the four justices of the court concurring, held that an action to recover personal property cannot be maintained, unless, at the time the action is commenced, the defendant has either the possession or control of the property, although the plaintiff is the owner thereof, and the defendant has wrongfully detained it.

This case was decided in January, 1851. In May, 1850, the contrary was held by the supreme court at a general term in the first district. (5 *How. Pr. R.* 148.)

In both cases the question arose on appeal from orders made upon motion to discharge the defendants respectively from arrest, under orders pursuant to *sub.* 3 of § 179 of the Code of 1849, the sheriff in each case having returned, to requisitions made under § 208 of the Code, that he could not take the property and deliver it to the plaintiffs, for the reason that it had been removed and disposed of, so that it could not be taken by him. In *Brockway* agt. *Burnap*, (12 *Barb.* 347,) WILLARD, Justice, and in *Elwood* agt. *Smith*, (9 *How. Pr. R.* 528,) HARRIS, Justice, both at special term, followed the case of *Roberts* agt. *Randel*, decided by the New-York superior court. In the last two cases the question arose on the trial; and it appearing in each that at the time the actions respectively were commenced, the defendants had not the possession or control of the property in question therein; it was held that the actions could not be sustained.

In neither of the cases last mentioned is any authority referred to, directly sustaining the positions therein taken; on the contrary, in *Roberts* agt. *Randel*, Mr. Justice SANDFORD, in his opinion, refers to *Cary* agt. *Hotaling*, (1 *Hill*, 311,) and *Olmsted* agt. *Hotaling*, (1 *id.* 317,) as cases where actions of replevin were sustained, although it appeared in each that the defendants had sold and parted with the possession of the property in controversy, before the suits respectively were commenced. As suggested by the learned justice, it is true, that it does not appear that any point was made on that question in either of those cases; and it may be added, that probably the point could not have been taken in either, under the pleadings

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therein, as the wrongful taking was complained of in each, and the only plea was *non cepit*, which put in issue only the taking, and the place of taking. (2 R. S. 528, § 39.)

In *Allen agt. Crary*, referred to by Mr. Justice WILLARD, the property sought to be replevied was not, at the time of the commencement of the action, either in the possession or under the control of the defendant; and the point was distinctly taken, that the action could not, for that reason, be maintained, and yet the action was sustained. But in that case also the wrongful taking was complained of, and the only plea was *non cepit*.

Both Mr. Justice SANDFORD and Justice WILLARD, in their opinions, refer to several other cases containing *dicta*, to the effect that replevin can be maintained in all cases where *trespass de bonis asportatis* will lie; and if that be so to the full extent, it is admitted by both the learned justices that replevin will lie in cases where, at the time of the commencement of the action, the property is neither in the possession nor under the control of the defendant. But they review those cases and attempt to show that in none of them was the precise point now under consideration raised; and they claim that the proposition contained in the *dicta* is not law, except with the qualification that the property, at the time of the commencement of the action of replevin, is in the defendant's possession.

The decision at special term in *Brockway agt. Burnap* has been reversed on appeal at general term. (*Vide* 16 Barb. S. C. R. 309.) And Mr. Justice HAND, in his opinion in the case on appeal, with this precise question under consideration, and which was properly raised by the case, after citing numerous authorities as sustaining him, lays it down as a general rule, that the action for the recovery of specific personal property will lie for the unlawful taking or detainer thereof, although, before suit brought, the defendant has wrongfully parted with the possession.

I am inclined to follow the decision on the appeal in the case last cited. Both Mr. Justice WILLARD and Justice SANDFORD, in their respective opinions, refer to the title of the Revised

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Statutes, in relation to the action of replevin, (2 R. S. 521, *et seq.*) and claim that the provisions of that title take it for granted that the action is to be brought only against the party in possession of the property; and particular reference is made to § 6, which gives the form of the writ of replevin, which must commence thus: "Whereas, A. B. complains that C. D. has taken, and does unjustly detain, (or 'does unjustly detain,' as the case may be,)" &c.; and they say, in substance, that the defendant cannot be said to detain the property after he has put it out of his possession. But it appears to me that a party who has tortiously taken the property of another, or who, having obtained possession lawfully, refuses to restore it to the owner, does, in contemplation of law and in fact, detain it, even after he has delivered it to another, who has no more right to the possession than he has.

Section 207 of the Code is also referred to, which requires that, in an action to recover possession of personal property, before the plaintiff is entitled to a delivery thereof to him *pendente lite*, he must make an affidavit setting forth, among other things, that the property is wrongfully detained by the defendant. But, if I have above given a correct construction to the word "detain," as used in the Revised Statutes, a plaintiff may rightfully make the affidavit, although before it is made the defendant has delivered possession to some third party having no right to it.

In all cases since the Code it is conceded that, under the Code, the action to recover personal property can be maintained in all cases, where replevin could be sustained under the Revised Statutes. The Revised Statutes extended the remedy by replevin, by allowing it to be brought in cases where property had been wrongfully detained, as well as where it had been wrongfully taken, when before it could only be brought where there had been a wrongful taking; and I do not understand that the Revised Statutes in any manner restricted the cases in which replevin could be brought where there was a wrongful taking. The contrary is not directly asserted in either of the two cases last above mentioned.

It should be here stated that in none of the cases above referred to, brought under the Code, was the wrongful taking of the property complained of, while in the case under consideration it is. As is suggested above, in three of the cases cited by Justices SANDFORD and WILLARD as containing *dicta* contrary to the rule contended for by them, and to which may be added *Ely* agt. *Ehle*, 3 Com. 506, it appeared that the defendants had neither the possession or control of the property sought to be replevied when the suits were commenced, and yet in none of them, with the exception of the case of *Allen* agt. *Crary*, was this suggested, either by court or counsel, as an objection to sustaining the actions; and in *Allen* agt. *Crary* the point was distinctly made by counsel, and yet the action was sustained. If this would or might have defeated the actions, although in none of these cases could it have been available as a defence under the pleadings therein, yet it is at least singular that it was not referred to as such by the court in either case, nor by the counsel except in one case. This is strong evidence to my mind that it would have been no defence if pleaded as such, or at least that the court and counsel so understood when those cases were heard and decided. I can find no precedent for a plea setting up such defence, nor any case prior to our Code holding that it would be a defence if pleaded. (*Vide Coombs* agt. *Wood*, 10 *Meeson & Welsby*, 127; 2 *Dowl. N. S.* 315.)

I have examined most of the English cases referred to by Mr. Justice HAND, in his opinion on the appeal in *Brockway* agt. *Burnap*. They are actions of detinue, and in several of them it is distinctly and directly held that it was no defence that the defendant had not the possession or control of the property when the suit was commenced.

The case of *Jones* agt. *Dowle*, (9 *Mees. & Wels.* 19,) was this: The plaintiff purchased the property in question of the defendant, an auctioneer, at an auction sale. The defendant, supposing that one Clift was the purchaser at the sale, instead of the plaintiff, delivered it to Clift, on his paying the bid. The plaintiff afterward demanded the property of the defendant, and

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it not being delivered to him, he brought the action. The plea was *non detinet*, and, on the trial, the above facts appearing in evidence, the defendant moved for a non-suit, on the ground that he had neither the possession nor control of the property when the action was commenced, which motion was denied, and a verdict found for the plaintiff; and the defendant having obtained a rule to show cause why the verdict should not be set aside; on argument at bar, the rule was discharged, thus sustaining the ruling at *nisi prius*. This defence, if a defence at all, was admissible under the plea of *non detinet*, (1 *Chitty's Pleadings*, 121,) and the ruling in the case was not placed on the ground that the pleadings excluded the defence. Substantially the same doctrine is held in several other of the cases thus cited by Mr. Justice HAND.

The action of replevin in the *detinet*, as it was called, was provided for by the Revised Statutes as a substitute for the action of *detinue*, and under those statutes could be brought in all cases where before *detinue* could. (2 *R. S.* 522; 3 *id.*, 2d. ed., 767; 1 *Chit. Pl.* 118, *et seq.*)

I see no reason for any distinction between the action of *detinue* or replevin in the *detinet*, and the action of replevin in the *cepit*, so far as relates to the question under consideration. Both were brought to recover specific personal property, the one being the proper remedy when the property was wrongfully taken, and the other when the defendant obtained possession lawfully, and afterwards unlawfully detained it. If *detinue*, or replevin in the *detinet*, could be brought against a defendant, after he had divested himself of the possession and control of the property in dispute by the delivery thereof to some third party, who had no more right to the possession than the defendant, and could be sustained, as I think it clearly established could have been done prior to the Code, it appears to me that, under the Code, the action to recover personal property can, under such circumstances, be sustained, and that, too, as well where a wrongful taking, as where a wrongful detention only is complained of.

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I therefore am of the opinion that the ruling at the circuit in this case, excluding the evidence offered, was right; and as that is the only point presented by the case, I think the motion for a new trial should be denied.

SUPREME COURT.

[No. 1.]

DAVID S. MILLS agt. JOHN THURSBY.

Although a question of *partnership* or *no partnership*, alone, is a proper one to be decided by a jury, yet where it is so connected with the accounts of the firm that a full statement of the accounts will require an examination, the cause should be *referred*.

New-York Special Term, March, 1850.

THIS action was commenced November, 1848, for an account as between partners, and for damages for unlawfully dissolving the co-partnership.

The defendant denied the existence of the co-partnership, and any liability to account. A motion was made upon the pleadings for a reference. The other facts appear in the opinion of the court.

N. B. BLUNT, BROWN & MATHEWS, *for plaintiff*.

GEORGE SULLIVAN, *for defendant*.

MITCHELL, Justice. The plaintiff alleges that he and the defendant were partners, and that the partnership was to continue five years, and was wrongfully dissolved by the defendant; and claims damages, and his share of the profits.

The defendant admits that plaintiff was held out by defendant as a partner, and allowed to act as such, so far as third persons were concerned; but says it was under an agreement that the plaintiff should not be a partner unless he put in a cer-

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tain amount as capital within a limited time ; that he did not put it in within that time, nor ever afterwards ; and that therefore, as between themselves, they are not partners, however they may have appeared to the world. .

The plaintiff says that the books will show that he put in this amount of capital : the defendant denies this.

To settle this last question, an examination of a long account will be necessary ; and if the plaintiff, who kept the accounts, has made erroneous entries, to give the appearance of paying what he has not paid ; or if this imputation be incorrectly made, referees can judge of these matters better than a jury. Ultimately, it is admitted, there must be a reference if the plaintiff succeed in establishing a partnership.

Although it might be proper to send to a jury a naked question of partnership or no partnership, if that inquiry were entirely isolated from the statement of the accounts, yet, even that question is here so connected with the accounts that a reference should be ordered.

Let referees be appointed.

SUPREME COURT.

[No. 2.]

DAVID S..MILLS agt. JOHN THURSBY.

Where a motion has been made, fully heard, and absolutely denied, it cannot again be heard upon *substantially* the same state of facts. (*Rule 87.*) And a party moving cannot bring forward his objections by *instalments*. A chamber order, which may operate to create a stay of proceedings beyond twenty days, is irregular.

Special Term, November, 1852.

JUDGMENT was recovered in this action on the 13th of September, 1851, in favor of the plaintiff, for \$19,455.78 ; and on

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the 29th day of September, 1851, motion was made before Judge EDMONDS, at special term for a stay of proceedings upon the judgment, pending an appeal to the general term, taken by the defendant, and also to vacate the judgment for alleged irregularity. Proceedings had been stayed upon the judgment by a series of *ex parte* orders, each of twenty days from its entry, to this time.

N. B. BLUNT, EDWARD SANDFORD, and ALBERT MATHEWS,
for plaintiff.

GEORGE SULLIVAN and N. D. ELLINGWOOD, *for defendant.*

ROOSEVELT, Justice. All the questions of alleged irregularity existed, and were known prior to the 29th Sept., 1851.

They were passed upon, after argument, by the court at special term, both parties being heard on that day.

The order of that date decided that there was no irregularity; that the defendant was not entitled to further time to make a case; and that the plaintiff's proceedings ought not and should not be stayed.

The defendant's application was accordingly denied, with costs.

By the 87th rule of the court, which this case demonstrates the necessity of enforcing, it is declared that "if any application for an order be made to any justice of this court, and such order be refused, in whole or in part, or be granted conditionally, or on terms, no subsequent application, upon the same state of facts, shall be made to any other justice; and if, upon such subsequent application, any order be made, it shall be revoked. (*See also Mitchell agt. Allen, 12 Wend. 290; Dolfus agt. Frost, 5 Hill, 493; Allen agt. Gibbs, 12 Wend. 202.*)

The same state of facts, substantially, is now presented.

If there be any difference, it is very slight; and even that is met by the established practice, that "a party complaining of any proceeding in a cause must embody all objections, then existing, in one motion; he cannot make a separate motion for each objection. (*Desmond agt. Wolf, 1 Code Rep. 49.*)

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In other words, he cannot bring forward his objections by instalments: such a course would lead to interminable vexation, delay, and expense.

The three several chamber orders obtained by the defendant, bearing date the 21st Nov., 1851, and the 7th and 29th Jan., 1852, so far as they may be construed as creating a stay of proceedings beyond twenty days, are irregular for the further reason that, by the 401st section of the Code, it is provided that—

“No order to stay proceedings for a longer time than twenty days, shall be granted by a judge out of court, except upon previous notice to the adverse party.”

SUPREME COURT.

[No. 3.]

JOHN B. THURSBY and others, executors, &c., of JOHN THURSBY, deceased, agt. DAVID S. MILLS.

Where a report of referees had been made, judgment thereon entered, and execution issued, pending which the defendant died; and on a supplemental complaint by the executors of the defendant, to review an alleged mistake or omission of evidence, in respect to the partnership accounts on the hearing; and for an injunction to stay the proceedings on the execution;

Held, it appearing that the defendant, on the hearing, was informed of the necessity of proving the fact which was sought to be corrected, and no excuse being offered for not moving for such relief within some two years after judgment entered, the plaintiffs were not entitled to a stay of proceedings.

New-York Special Term, October, 1853

JUDGMENT was recovered in this court in an action between partners on an account, in favor of Mills, against John Thursby for \$19,455.78, September 13, 1851, and appeal taken to the general term. Motions for a stay of proceedings had been successively made at special term by defendant, and, after argument, denied—September 29, 1851, also November 5, and De-

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ember 15, 1852, also February 19, and April 16, 1853. The defendant, John Thursby, died April 23d, 1853, and the present plaintiffs were his executors.

This action was commenced as a *supplemental complaint to review* and correct certain alleged accidental omissions and errors in the accounts on the trial before referees, by whom the cause was heard.

The complaint averred the commencement of the suit by Mills against John Thursby, and referred to the allegations in the complaint, of a partnership between the parties, of the unlawful dissolution thereof by Thursby, and of the claim therein for damages, and an account of the partnership transactions. That the defendant had answered, denying the material allegations; that the action had been referred to John Cochrane, James W. Metcalf, and Schuyler Livingston, to hear and decide the whole issue; and that they, in July, 1851, had reported due the plaintiff \$16,889.89, besides costs; that judgment had been entered thereon, and an appeal taken as above mentioned. That on the hearing before the referees, it was accidentally omitted by Thursby to produce before them evidence showing the amount of bad debts and losses incurred in the business during the existence of the partnership, and they were not taken into account by the referees. That the loss from bad debts amounted to over \$10,000; and that Thursby had not discovered, until after judgment, the accidental omission of this evidence. That executions had been issued upon the judgment to the sheriffs of the counties of Kings and New-York, and that each claimed to have levied upon sufficient property of the defendant to satisfy the judgment. That Thursby had died in April, 1853, leaving a will, which had been proved, and letters testamentary issued to plaintiffs, in whose name the suit had been revived.

Motion was now made for an injunction to restrain the plaintiff from collecting the judgment, or ruling either sheriff to return the executions, or taking proceedings against them to recover or collect the judgment.

The defendant, Mills, by his answer, denied the allegations

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respecting bad debts, and alleged that all the evidence concerning the debts was produced before the referees and fully heard; and that all debts of the co-partnership from the beginning, except about \$1,500, had been paid. That execution was issued upon the judgment to the sheriff of New-York in February, 1852, and to the sheriff of Kings in December, 1852. That on the 9th of May, 1853, both sheriffs had been notified to execute the writs, and return them according to law. That neither of the executions had been returned; and on July 30th attachments had been issued against both sheriffs for the contempt, and those proceedings were still pending; and that both sheriffs insisted they had no property under levy or in their custody out of which to satisfy the executions; and that Thursby, in his will, expressly provided for the payment of this judgment.

Defendant also set up, by way of defence, that the suit for review must be brought within two years, and a condition precedent to filing such bill, was the performance of such parts of the decree not sought to be reviewed; and that no part of the judgment was paid.

DANIEL LORD & N. DANE ELLINGWOOD, *for plaintiffs,*

Referred to 4 *How. Pr. Rep.*, p. 113.

ALBERT MATHEWS, *for defendant,*

Cited—*Chancery Rules*, 173, 90; *Code*, §§ 332, 468, 469; *Williams* agt. *Baldwin*, 18 *Johns.* 489; 3 *Munf. R.* 112; 5 *Wend.* 127; 6 *Munf. R.* 425; 10 *Wend.* 285; 5 *Mason R.* 803; 2 *John. Ch. R.* 488; 3 *Paige R.* 206; 1st. *Bibb. R.* 455.

EDWARDS, Justice. The ground upon which the plaintiffs ask for an injunction is, that John Thursby, in the suit brought against him by the defendant Mills, accidentally omitted to prove before the referees that certain debts, contracted in the partnership business between Thursby and Mills, were bad. It appears that the report of the referees was made in the year

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1851; and that, in the written opinion delivered by them, they stated that they found "that Thursby had exonerated Mills from all losses in the business, as between themselves; and that it was unnecessary for the referees to determine whether the debts due to the firm were by persons of pecuniary means or not." At the time that this report was made, Thursby either knew or had the means of knowing whether any, and, if any, which of the debts were bad. He was at that time informed of the necessity of proving that fact, if he intended to do so.

Since the report was made, judgment has been entered, and an execution issued; and although numerous and multifarious motions have been made which have had the effect of preventing the defendant from obtaining satisfaction of his judgment, still no application has, until now, been made to the court for relief on the ground of any mistake or misapprehension; and no excuse is given for this great delay. I do not think that the plaintiff has made out such a case as entitles him to an injunction.

Motion denied, with \$10 costs.

SUPREME COURT.

[No. 4.]

DAVID S. MILLS agt. JOHN B. THURSBY and others, executors,
&c., of JOHN THURSBY, deceased.

Where it appeared that executions were issued upon a judgment against the defendant, one to the sheriff of Kings and one to the sheriff of New-York, that the latter had levied upon sufficient property to satisfy the execution, but the defendant had obtained, by default, a stay of proceedings, during which stay the property levied upon was withdrawn from the effect of the execution, *Held*, under such circumstances, the plaintiff should not be stayed in enforcing his levy in Kings county.

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New-York Special Term, October, 1853.

THIS was 'a motion for an order to restrain the sheriff of Kings county from making sale of the property of John Thursby, deceased, against whom the plaintiff had recovered a judgment in September, 1851, for 19,455.78, upon which executions had been issued by the plaintiff, in the lifetime of the judgment-debtor, to the sheriffs of New-York and Kings counties. Appeal having been taken to the general term, and the suit revived by the executors of Thursby, but no stay of proceedings. The defendants alleged that the sheriff of New-York had levied upon property of Thursby sufficient to satisfy the judgment, and that the sheriff of Kings pretended he had made a levy upon property sufficient to satisfy the debt. That the defendants had filed their complaint in this court for a review of the finding of the referees, upon which the judgment was entered, on the ground of an accidental omission on the part of Thursby to prove before them certain alleged bad debts, amounting to about \$10,000; and in that suit they had prayed for an injunction against the enforcement of the judgment; and that the sheriff of Kings county had advertised the real estate of John Thursby for sale on the 5th of November, and his personal estate on the 22d of October, 1853.

The plaintiff denied the allegation as to bad debts, and alleged that an order for a stay of proceedings of the sheriff of New-York had once been obtained by default; and, before the stay was vacated, John Thursby had re-possessioned himself of the property levied upon by the sheriff.

N. DANE ELLINGWOOD, *for defendants,*

Cited 6 *Wend. R.* 562; 20 *Johns. R.* 294.

ALBERT MATHEWS, *for plaintiff,*

Cited 4 *Hill*, 619; 23 *Wend.* 490.

EDWARDS, Justice. The affidavit of the defendant alleges, that a levy was made under an execution issued in New-York,

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but it does not state that the judgment has, in fact, been satisfied, nor that there is any property now held under the levy. The plaintiff's affidavit alleges that an order was obtained by default, during the accidental absence of his counsel, and that, before it was set aside, the property levied on was withdrawn, from the effect of the execution.

Under these circumstances, I see no good reason why the plaintiff should be restrained from enforcing his levy in Kings county.

Motion denied, with \$10 costs.

SUPREME COURT.

[No. 5.]

DAVID S. MILLS agt. JOHN B. THURSBY and others, executors, &c.

Where it appeared that the sheriff called upon the defendant in the execution, at his place of business, and at his house, and informed him that he made a levy upon the personal property then visible; and it was understood between the defendant and the sheriff this should be considered a levy upon enough, besides upon the same premises, to satisfy the execution; but the sheriff made no inventory or other levy, and the defendant requested him not to remove any property or disturb his family by any further levy, and promised the judgment should be settled,

Held, that this was a sufficient levy upon the personal property of the defendant, but not sufficient to hold the real estate.

New-York Special Term, November 26, 1853.

THIS was a motion for a stay of proceedings and to vacate a levy made by the sheriff of Kings County, upon property of John Thursby, deceased, under an execution issued in his life time, upon a judgment recovered in this action, September, 1851, for

\$19,455.78; appeal having been taken to the general term, and the suit revived by the defendants. They alleged that the sheriff falsely pretended to have made a levy upon the personal property of the deceased, who had been one of the official sureties of the sheriff, and possessed of large property, which fact was known to the sheriff; that upon the receipt of the execution, the sheriff had written a note to John Thursby, requesting to see him; that Thursby called upon the sheriff, and upon learning of the execution, informed the sheriff that a stay of proceedings would be procured, and requested him not to proceed. That soon after, a stay of proceedings was procured, and the sheriff never did proceed. That, subsequently, after the death of Thursby, and the revival of the suit, the sheriff had been notified to return the execution, and thereupon pretending he had made a levy upon the personal property of Thursby, he had advertised it for sale under the execution. That no levy had been in fact made, until after the death of John Thursby, and until after the expiration of sixty days, during which, the sheriff was bound to have executed the writ. That the sheriff had also advertised for sale, under the execution, the real estate of Thursby, of which he was possessed at the time of his death; but that no levy had ever been made upon it, nor had it been advertised for sale until after the death of John Thursby, and after the expiration of sixty days, during which the sheriff was bound to have executed the writ.

The plaintiff alleged that the sheriff had called upon the defendant in the execution, and notified him of its existence, and being in a room of the defendant's house, and also at his place of business in Kings County, informed him that he made a levy upon the personal property then visible; and it was understood between the defendant and the sheriff this should be considered a levy upon enough, besides upon the same premises, to satisfy the execution; but he made no inventory or other levy; and the defendant requested him not to remove any property, or disturb his family by any further levy, and promised the judgment should be settled; and the sheriff averred that his proceedings under the execution, had been stayed nearly all

the time by *ex parte* orders which the defendant had obtained and pretended were valid.

N. DANE ELLINGWOOD, *for defendants.*

Mr. COGGSWELL, *for sheriff.*

ALBERT MATHEWS, *for plaintiff.*

Cited Dresser agt. Ainsworth, (9 Barb. Sup. C. R., 619; 1 Paige, 125; 11 Paige, 21; 3 Barb. Ch. R., 630; 4 Hill, 158; 5 Denio, 619, 625; 9 Johns., 132; 12 Johns., 403; 17 Johns., 116; 18 Johns., 311, 363.)

EDWARDS, Justice.—I think that the affidavit of the sheriff shows that a valid levy was made upon the personal property of the defendant before his death, and before the return day of the execution. But I am not prepared to say that there was a sufficient levy upon the real estate. It does not appear that any act whatever was done, showing that the sheriff intended to make such levy. On the contrary, I think that his affidavit shows that he did not intend to levy upon any other than the personal property. If the plaintiff insists that a valid levy can be made under an execution after the return day, I will hear a further argument upon that point. In the meantime, the motion to stay proceedings, under the levy made upon the personal property of the defendant, is denied without costs.

SUPREME COURT.

[No. 6.]

DAVID S. MILLS agt. JOHN B. THURSBY and others, executors, &c.

Where the plaintiff offered to give his bond, with sureties, to refund whatever part of the judgment the court, on appeal, should adjudge him not entitled to; and the defendant accepted the offer; and an order was made denying defendant's motion to stay proceedings, and that he should pay the money in twenty days upon the delivery to him of the bond—which bond was immediately afterwards tendered to the defendant, but he died shortly after, without having paid the money;

Held, that this consent, and the order made on it, must bind the executors of the defendant, (the suit having been revived against the executors;) and no stay of proceedings on the judgment could be granted.

New-York Special Term, January 16, 1854.

THIS was a motion by defendants for a stay of proceedings upon the execution issued upon the judgment obtained in this action, in September, 1851, mentioned in the previous cases. The facts sufficiently appear in the opinion of the court.

N. DANE ELLINGWOOD, *for defendant.*

ALBERT MATHEWS, *for plaintiff.*

MITCHELL, Justice. The defendants move to stay proceedings on the judgment obtained, and execution issued, against their testator; and show that they have recently executed a bond to the plaintiff, with sureties, conditioned to pay any amount that shall be finally adjudged by the court to be due, by the testator or his estate, to the plaintiff; and that, on appeal to the general term, from the judgment entered against the testator, the defendants were ready to argue the appeal, but the plaintiff was not ready.

The opposing papers show that the defendants' default was

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entered at the general term, and opened at the last general term; but with a condition that the cause should not be argued at that term, unless the plaintiff should be ready.

The default being opened on this condition, the plaintiff had the right to avail himself of it, and was not in default for so doing.

The motion for a stay of proceedings has been frequently before the court. In April, 1853, on such a motion, the plaintiff offered to give his bond, with sureties, to refund whatever part of the judgment the court should adjudge him not to be entitled to; and the defendant thereupon consented that his motion should be denied, and the plaintiff's consent accepted; and an order was made accordingly, that he should pay the money in 20 days, upon the delivery to him of an undertaking to that effect, to be approved by one of the justices of the court. The undertaking was immediately afterwards tendered to the defendant, the testator; but he died shortly after, without having paid the money.

This consent, and the order made on it, must bind these defendants; and no stay of proceedings on the judgment can now be granted. This, however, is on the supposition that the plaintiff comply, or has complied, with his part of that order. The undertaking must, therefore, be submitted to the court; and, if it were not accepted by the testator in his lifetime, should be now executed to the executors, and approved by one of the judges of this court; and it may be proper to execute it in the form of a bond, instead of an undertaking.

As the plaintiff also prefers to retain the execution, the bond given on this motion by the defendants, and which was intended only to procure a stay, will be returned to the defendants to be cancelled.

On the plaintiff complying with the above requirements on his part, the stay of proceedings temporarily granted is vacated, and any further stay denied.

KINGS COUNTY SURROGATES' COURT.

[No. 7.]

In the matter of the claim of DAVID S. MILLS, a creditor, agt.
The estate of JOHN THURSBY, deceased.

A surrogate, on an application under § 18 of 2 R. S., 116, has a discretion to decree payment of a judgment against a testator, or a proportional part thereof; but this discretion will not be exercised for the benefit of the applicant, where it appears that there is comparatively a small amount of cash and of assets in the inventory, that are immediately convertible into money; and the testator having provided in his will for the payment of the claim out of moneys to be raised on mortgage upon his real estate; and that the real estate and his business should be preserved for the benefit of his children—there being property of the testator amply sufficient to pay the judgment.

Special Term, February 17, 1854.

THIS was an application by Mills, to the surrogate of Kings County, to compel the executors of John Thursby, deceased, to pay a judgment recovered in the supreme court, September, 1851, for \$19,455.78, and docketed in that county before the death of the judgment debtor. The facts sufficiently appear in the opinion of the court.

ALBERT MATHEWS, *for petitioner Mills.*

N. DANE ELLINGWOOD, *for executors.*

By the court—JESSE C. SMITH, surrogate. This application is made under subdivision 1 of § 18, (2 R. S., p. 116,) for the payment of a judgment in favor of said David S. Mills against the deceased, recovered in his lifetime. The answer and admissions showed that an appeal was taken from the judgment, which was entered upon the report of referees, before the death of said John Thursby, which is still pending; that no stay of proceedings was obtained upon the said judgment, in conse-

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quence of some informality ; that the sheriff made a levy during the lifetime of the said deceased, upon his personal property ; that the proceedings upon the levy has been stayed from time to time, by orders obtained by the deceased and his representatives ; and that a motion is now pending in favor of the plaintiff, David S. Mills, against the sheriff of the County of Kings, for a fine or penalty against him for a neglect to return said execution.

The inventory of the executors, which has been filed since this proceeding was commenced, shows that the personal estate of the deceased consisted of claims against insurance companies for \$7,000, which claims do not appear to be at once collectable ; \$6,000 of bank and insurance stock ; \$3,000 in cash ; \$6,734.50 in machinery in a ropewalk, formerly carried on by deceased, and now carried on by the executors ; and that the whole inventory, including household furniture, claims, moneys, stocks, &c., amounts to \$23,442.68. It is admitted that the estate is amply sufficient to pay the claim.

It does not appear that any of the personal assets have been sold or reduced to cash. On the 16th day of June, 1853, letters testamentary were issued to the executors. The will of the deceased, after providing for the payment of his debts, and some legacies that are charged upon the estate, directs the body of the estate, both real and personal, to be appraised by certain persons named in the will, and to be taken by certain of the sons of the deceased, who are some of the executors, at the valuation made by these appraisers, subject to the charges thereon.

The will then provides for raising the money, by bond and mortgage on the estate, to pay this claim or judgment, if it shall become necessary so to do.

The will evidently contemplates the preservation of the real estate, and of the machinery necessary to carry on the ropewalk, for the benefit of the sons of the deceased, to whom the same is devised and bequeathed.

The general policy of the statute, as stated by Chief Justice NELSON in *Fitzpatrick* agt. *Brady*, (6 *Hill*, 581,) is to allow eighteen months to settle the estates of deceased persons, or, at

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all events, to give twelve months before proceedings should, as a general thing, be taken to compel payment against the estate of a deceased person.

It is six months after the issuing of letters testamentary, before an order can be obtained to advertise for claims against the estate.

It is then six months before the notice expires.

If a party die before execution, and after judgment against him, no execution can issue against him until one year after his death; and so, under the law of 1851, application can only be made, to issue execution against the real estate of the deceased on which the judgment is a lien, until one year after the death of the judgment debtor. Is there anything in the nature and circumstances of this case that should call upon the surrogate to exercise the power and discretion which is given him by the 18th section, to decree payment of the claim, or a proportional part thereof? It is said the will gives the power to the executors to raise money by mortgage, and pay off this claim. I have no power to compel them so to do. I might decree that they pay the whole, or a proportional part of the debt, and so compel them to sell the personal property, or to raise money by mortgage. Here, again, the statute authorizes sales of personal property out of the city of New-York, on a credit not exceeding one year, with approved security. It might be deemed for the interest of the estate to exercise this power of selling on a credit, and then it would be impossible to collect the proceeds so as to pay upon the application. Under the circumstances of this case, considering the small amount of cash and of assets that are immediately convertible in the inventory; the intent of the testator to preserve the business to his sons; and the condition of the appeal and litigation, in reference to the judgment in the court of law where the same was obtained, I do not think that the exercise of a sound discretion would require me to decree payment of said judgment, or a proportional part thereof, at this time. But as the decision of the question on appeal may place this matter in a situation to call for the exercise of such discretion, I shall deny the

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present application without costs, and with leave to renew the same at a subsequent time upon application, showing additional facts to authorize the same, and upon notice of six days to the executors and executrix.

SUPREME COURT.

[No. 8.]

DAVID S. MILLS agt. JOHN B. THURSBY and others, executors
of John Thursby, deceased.

An application to order an undertaking on appeal to be filed *nunc pro tunc*, is in the discretion of the court.

And the court has a discretion to order a *stay of proceedings* on appeal from the special to the general term, where no proper undertaking has been filed and served, even if it were necessary (under § 340,) that a copy of the undertaking be served with the notice of the appeal. (*See Code*, §§ 275, 327.)

Where it appears that an appeal from the special to the general term is taken in good faith, and that the appeal does not, upon its merits, appear to be frivolous, although no proper undertaking may have been filed and served with the notice of appeal, the court will allow the undertaking to be filed, and a copy of it served as of the day when the notice was served, with liberty to the respondent to except to the sureties, with a stay of proceedings until the appeal be decided.

New-York Special Term, May 12, 1854.

THIS was a motion to amend an appeal from a judgment in a proceeding against the executors of a deceased judgment debtor, who was summoned under sections 375 and 376 of the Code, providing that his "*personal representatives*" be "summoned at any time *within one year* after their appointment," "to show cause why they should not be bound by the judgment in the same manner as if they had been originally summoned."

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N. DANE ELLINGWOOD, *for the appellants*, insisted the mistake of appellants was accidental, and ought to be amended.

ALBERT MATHEWS, *for the respondent*, contended the appeal was frivolous, and not taken in good faith; and relied on the above named sections of the Code, as amended, to sustain the regularity of the judgments.

MITCHELL, Justice.—Mills recovered a judgment in this court against John Thursby, the testator, for \$19,455.78-100th, on 13th September, 1851.

The testator died 23d April, 1853, and the defendants were appointed his executors on the 15th of June following. On the 12th of the following November, the plaintiff issued a summons against these defendants, requiring them to show cause at a special term of this court, in twenty days after service of the summons, why that judgment (describing it as obtained on the 13th September, 1851, for \$19,455.78,) should not be enforced against the estate of said John Thursby, in the hands of the executors; or why further relief should not be granted.

No complaint was filed or served, and no summons as on a new action; but the summons above described was accompanied by the affidavit of the plaintiff's attorney, who had subscribed the summons, showing the amount and date of the judgment, the death of the testator, and the appointment of the executors, and that no part of the judgment was paid.

The defendants, by way of answer, denied that such judgment was rendered. The matter was heard at special term, on 9th March, 1854, and an *order* made reciting the true amount of the judgment and its date, and the other facts above stated; and on that order judgment was entered on 17th March, 1854, stating the principal and interest due on the first judgment, and the costs on this proceeding, and adjudging that the plaintiffs recover of the *defendants*, as *executors* of the will of John Thursby, deceased, the said amount so ordered to be paid and interest and costs, in the whole amounting to \$23,024.94; and that the property and estate of John Thursby be applied to the

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payment thereof; and *that the defendants pay the same to the plaintiff*, and that he *have* execution therefor.

From this judgment, the defendants appealed in due time to the general term, and gave an undertaking with four sureties, two of whom justified in \$14,000 each, and two in \$10,000 each.

This was held to be irregular, and a stay refused on that account. A new undertaking was then given by two sureties, who justified in \$40,049.89-100th each. This was objected to as not being double of the judgment, and of the \$250 for the costs on appeal. After that, on the 11th of April last, a third undertaking was executed by two sureties who justified in \$47,000, and a copy was served with notice on the plaintiff's attorney. The defendants now move for a stay of proceedings until the appeal be decided, and that the last undertaking be filed *nunc pro tunc*, as of the day when the notice of appeal was served, with liberty to the plaintiff to except to the same.

The defendants have, evidently, honestly intended to give the requisite security, and in due form; they have twice slipped in a matter of practice—but the undertaking was each time in due form, and the justification alone imperfect in form.

The Code has an express provision, that when a party shall give, *in good faith*, notice of appeal from a judgment or order, and shall omit, through mistake, to do any other act necessary to perfect the appeal, *or to stay proceedings*; the court may permit an amendment on such terms as may be just. (Code, §§ 327, 275.)

This applies directly to this case, if the appeal was taken in good faith. Section 348 also allows a stay of proceedings on an appeal from the special to the general term, on such terms, as to security or otherwise, as may be just. The court, therefore, has a discretion to order a stay, even if it were necessary (under § 340) that the copy of the undertaking be served with the notice of appeal. This application to order the undertaking to be filed *nunc pro tunc*, is to the discretion of the court.

The plaintiff, therefore, has insisted that there are palpably

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no merits in this appeal. This requires the judgment to be looked into. The judgment appealed from professes to be founded on sections 376 to 381 of the Code. Those sections apply only to the *heirs, devisees or legatees* of the judgment debtor, or his *terre tenants*—these defendants are neither heirs, devisees, legatees, or terre tenants—they are simply executors. The proceedings under those sections cannot be commenced until after the expiration of three years from the granting of letters testamentary; this was commenced within five months after that time.

If this was intended as a new action, the summons should have required the defendants to answer the *complaint*, and serve a copy of the answer, and should have stated that, in default of an answer, the plaintiff would take judgment for a certain amount, or apply for the relief demanded in the *complaint*. (*Code*, §§ 128, 129, 107, 108.)

The summons served did not in any respect comply with this. It was to show cause as on a motion, and did not refer to any complaint, and no complaint was ever filed, or ever formed any part of the judgment.

If this proceeding were intended as a substitute for a *scire facias*, the relief is to be sought by a new action, (*Code*, § 428,) and not under § 376, &c.

The judgment against executors at common law, when they were not guilty of false pleading, was for the amount of the debt "to be levied on the goods and chattels of the testator in the hands of the executors, unadministered;" it now is probably never to be entered against the defendants personally, except for costs under certain circumstances. This judgment is, that "the plaintiff recover of the defendants, as executors," the whole of the original judgment, interest and costs; this is a distinct part of the judgment, and *may be* considered as binding them personally—and it *may be* that the additional clause, which is cumulative, and not restrictive in its language, affords an additional remedy, and is no limitation on the first part of the judgment, viz., "*and that the property and estate of John Thursby be applied to the payment thereof;*" especially as the next

sentence in the judgment is also cumulative and personal to the defendants, and not against them as executors, viz., "*and that the defendants pay the same to the plaintiff,*" and that he have execution therefor.

The summons asked for no personal remedy against the defendants, but that the judgment might be enforced against the *estate* of John Thursby in the hands of the executors, or for further relief. Still, the judgment seems to be against the defendants personally.

This judgment seems to assume that the executors have sufficient assets to pay this debt, and that there are no other judgments or debts of a higher nature. Yet it was entered only nine months after letters testamentary were granted, and so before these facts could be ascertained by legal notice to the creditors of the testator to present their claims.

The law points out the remedy of a creditor who has judgment against an executor, and directs him to apply to the surrogate for an order against the executor to show cause why execution should not issue on the judgment, and on such citation the surrogate is to inquire as to the assets applicable to such judgment, (2 R. S., 116, §§ 19, 20,) and declares that "no execution shall issue upon a judgment against an executor or administrator, until an account of his administration shall have been rendered and settled; or on an order of the surrogate."

Yet this judgment, without the executor's account being settled, and without any order of the surrogate, orders execution to issue. (2 R. S., 88, § 32; *see id.*, 363, § 3.)

It may be that in some of these respects the judgment appealed from is so erroneous that it must be set aside on appeal, although no exceptions were taken; and it may be also, that, on appeal to the general term, an error in the proceedings, not occurring at the trial, may be noticed, although not pointed out at the special term. The questions are worthy of deliberate examination, and enough is shown to prove that the appeal is taken in good faith, and that the discretion of the court would be properly exercised in allowing the undertaking to be filed, and a copy of it served as of the day when the notice was

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served, with liberty to the plaintiff to except to the sureties, and with a stay of proceedings until the appeal be decided, if the present sureties or new sureties shall satisfactorily justify.

No costs are given to either party.

SUPREME COURT.

[No. 9.]

DAVID S. MILLS, respondent, agt. JOHN B. THURSBY and others, executors, &c., appellants.

In an action for a dissolution of a co-partnership, and an account, referred to three referees, (since the amended Code of July 10, 1851, requiring referees to "*state the facts found, and the conclusions of law, separately ;*") and an account taken and judgment had on referees' report for plaintiff, and an appeal taken by defendants to the general term, and judgment affirmed; and appeal taken by defendants to the court of appeals;

Held, that on the application of the appellant, this court, at general term, will settle a case containing the facts found by them on the hearing of the appeal, to be inserted in the record, to be certified to the court of appeals

New-York General Term, June 19, 1855.

Before MITCHELL, COWLES and CLERKE, Justices.

JUDGMENT having been entered in this action on the report of the referees, made since the amendments of the Code of July 10, 1851, the defendant appealed to the general term, and the judgment was modified as to costs, and permission given to the appellants to apply at special term for leave to have certain matters referred to the referees for rehearing. This decision is reported *ante*, page 116.

From this judgment of the general term, the defendants appealed to the court of appeals. The appeal having been perfected, the appellants applied to the court of appeals for an

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order that the cause be remanded to the supreme court, to settle a case comprising the facts found by them in rendering the judgment appealed from, and obtained an order that they be at liberty to move the supreme court for such relief as to that court should seem proper, notwithstanding the appeal.

Motion was now made that a case be settled by this court, comprising the facts, and not the evidence of the facts, found by the court at general term, at the hearing upon which the judgments was given.

N. DANE ELLINGWOOD, *for the motion*, said,

First. The court of appeals will not review the evidence of facts, but require that the facts themselves should be set forth, or that a case in the nature of a special verdict be made and settled by the court. (*Easterly* agt. *Cole*, 3 *Comstock R.*, p. 504.)

Second. On an appeal from an order made at the general term of this court, a case should be made of all the facts found by that court from the evidence before them. In the present case, the court, at general term, reviewed all the testimony taken before the referees, but whether they found the same facts from such evidence as were found by the referees, cannot appear, unless a case be prepared or settled showing the facts so found by them.

Third. It does not follow, because a report of referees has been affirmed by the court, at general term, that therefore the court found the same facts from the evidence as had been found by the referees. The court may have arrived at different conclusions of fact from a review of the testimony, and, nevertheless, affirmed the report.

Fourth. The order made in this cause at general term, from which an appeal has been brought to the court of appeals, cannot there be reviewed, except in regard to conclusions of law, upon the facts as found by this court from the testimony produced before them on the hearing of such general term.

ALBERT MATHEWS, *for the respondents*, said,

First. The court of appeals “require” nothing. They will not review a finding of *fact*. The case of *Easterly agt. Cole* (3 *Comstock Reports*,) was before the Code, (as amended,) and arose under the practice before the Code was adopted. The cases there cited show the propriety of this procedure formerly. It is useless, now. Under the old practice, the referees made a general report. They found no facts. A statement of facts found by the court was necessary, to show upon what facts the judgment of the court was rendered. The appellate court could only review the finding of a court, and they would not inquire what was found by the referees. But under the Code, referees hear and decide as a court, and their determinations of fact and law are part of the record, and are reviewable in like manner. (*Code*, §§ 272, 278, 281; *see cases cited in 3 Comstock R.*, pp. 504, 505; *see Morgan agt. Bruce*, 1 *Co. R.*, *N. S.*, p. 364; *Church agt. Erben*, 4 *Sand. R.* 691.)

Second. There is the same necessity, in every motion to set aside the verdict of a jury, that the court, at general term, should make a case of the facts found by that court from the evidence before them. The defendants’ argument, at the general term, was that the referees had found against the weight of evidence, and so far as the determination of this court was adverse, it was final, and the court of appeals will not review it. (*Morgan agt. Bruce*, 1 *Co. R.*, *N. S.*, 364.)

Third. It might happen that the members of this court, at general term, did not agree either with the referees or with each other upon any one question of fact; and yet, each separately found facts enough to sustain the referees’ report. How, then, could they settle a case? If they had found materially different from the referees, they would have granted a new trial. If this motion were granted, we should have the anomaly of two separate findings of facts, made part of the same record,—a thing unheard of. But it is immaterial whether this court, at general term, found the same facts as the referees; for

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the court of appeals will not review either. (*Newtown* agt. *Harris*, 1 Co. R., N. S., 414; *Borst* agt. *Spelman*, 4 Comst. 284; *Morris* agt. *Husson*, 4 Seld. R. 405.)

Fourth. If the appeal is taken from the "order" refusing a new trial, *as such*, and not from the *judgment* of affirmance made by this court at general term, then there can be no review in the court of appeals. If the appeal is taken from the judgment, the court of appeals can determine whether, by the referees, any testimony was improperly admitted or excluded, (to which the defendant took exception;) and also, whether the referees improperly found any conclusion of law upon the facts found by them. This court sat at general term in this cause as an appellate court, and the judgment entered on the report of the referees, so far as affected by their reversal or affirmance, or modification of the judgment, is alone open to review in the court of appeals. This motion is calculated to ensnare this court, sitting at general term, into making itself a tribunal of facts to hear and find original determinations of fact, so as to give the defeated party another and additional chance, in the court of appeals, of reversal of the judgment entered upon the referees' report. (*See Code*, § 11.)

The court gave no written opinion; but ordered "that the appellants, within 20 days, submit to the respondent such statement of facts as, in their opinion, the general term actually found on the hearing of the appeal, and the respondent prepare and serve amendments thereto; and if the amendments are not agreed to, the same shall be settled by one of the justices of this court.

SUPREME COURT.

DANIEL E. DOLE agt. D. S. MANLEY and WM. R. MANLEY.

The *misnomer* of a defendant can be taken advantage of, by *motion*, to set aside the summons and complaint. (7 *How. Pr. R.* 25.)

But if the notice of motion is signed by the attorney generally, without restricting his appearance to the purposes of the motion only, it will be deemed a notice of retainer *generally* for the defendant, which operates as an *appearance* generally by the defendant in the cause; and he is thereby precluded from the benefits of the motion; because such a motion can only be made before the defendant has appeared generally. (See 1 *Wend.* 13; 9 *How. Pr. R.* 445.)

Erie Special Term, March, 1855.

MOTION by defendant, D. S. Manley, to set aside the summons and complaint for a misnomer.

The true name of the defendant making the motion is *Dean* S. Manley, and it is written in the summons and complaint *Dennis* S. Manley. The summons and complaint were served upon him at the same time. The notice of this motion is entitled "Daniel E. Dole agt. *Dean* S. Manley, sued by the named of *Dennis* S. Manley, impleaded with William R. Manley," and is signed "William H. Andrews, attorney for defendant, *Dean* S. Manley, sued, &c."

W. H. ANDREWS, *for motion.*

P. L. ELY, *opposed.*

BOWEN, Justice. In *Elliot* agt. *Hart*, (7 *How. Pr. Rep.* 25,) it was held that the misnomer of a defendant could be taken advantage of, by motion, to set aside the summons and complaint. That it was doubtful whether, under the Code, there was any remedy therefor by answer; and that, as there should be some remedy, a defendant should be allowed to resort to a motion, pursuant to the practice prior to the adoption by the supreme court of the rule of 1825.

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That rule provided, that the court would not thereafter entertain a motion to set aside process, or proceedings in a cause, on the ground of a misnomer of the party arrested, but would leave him to his remedy by plea in abatement. In the cases of *Mann* agt. *Carley*, and *Chapin* agt. *Same*, (4 *Cow.* 148,) which occasioned the adoption of the rule of 1825, and which are the only cases in the courts of this state, prior to the adoption of that rule, sanctioning the remedy by motion, it was held, that such motion must be made before the defendant had appeared in the cause. If the practice prior to the rule of 1825 is to be resorted to under the Code, the same rules which governed the practice then, should be applicable now; and consequently the motion must now be made before the defendant has appeared.

It is not shown that the defendant making this motion has appeared in the cause, except by the notice of the motion. The notice is entitled in the cause, and is signed by the defendant's attorney, as his attorney generally in the cause; and the title gives the true name of the defendant, together with the name by which he was prosecuted.

It was held in the case of *Mann* agt. *Carley*, above cited, that a notice of retainer was not an appearance in the cause; but the court afterwards provided, by a general rule, that service of a notice of appearance, or of retainer generally, should in all cases be deemed an appearance, except where special bail should be required—(see *Rule 26 of Rules of 1845*)—which rule has been continued to the present time. (See *Rules of 1854, No. 7.*)

The notice of the motion in this case is equivalent to, and should be treated as, a notice of retainer generally. (1 *Wen.* 18; 9 *How. Pr. R.* 445.) After the service of this notice, the plaintiff was bound to treat the attorney who signed the notice as the attorney for the defendant in the cause generally; and should he take subsequent proceedings in the cause without notice thereof to the attorney who signed this notice, or proceed in the cause as against a defendant who had not appeared, his proceedings would be set aside for irregularity.

I think the motion should be denied. As the plaintiff may

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wish to amend his summons and complaint, by inserting therein the true name, no costs of opposing the motion are given, and the plaintiff has liberty to amend.

SUPREME COURT.

ERASTUS D. WEBSTER, respondent, agt. NELSON HOPKINS, impleaded, &c., appellant.

The office of a *notice of appeal* to bring up a judgment of a justice of the peace for review, is, to require and enable the justice to make a full and complete return of the entire proceedings in the cause, and especially (by stating the grounds of the appeal) to call his attention to the matters which are particularly relied upon to reverse his judgment. It is no part of the papers upon which the appeal is to be heard in the appellate court. It gives the latter court jurisdiction of the parties and of the subject matter, and having done this, its functions cease. Its defects cannot be considered where the appeal is brought to a hearing upon its merits.

If the notice is defective in stating the grounds of the appeal, or otherwise, the remedy is by motion to *dismiss* the appeal.

Justices of the peace have no power to amend the process or pleadings in an action against two or more defendants, on a joint contract, by striking out the name of a co-defendant, and rendering judgment against one and in favor of the other.

The sections of the Code which give this power of amending process and pleadings, by adding or striking out the names of parties, and the correction of mistakes, &c., have no application to justices' courts. The title which treats of this subject, in terms, has reference to the pleadings in civil actions, and is *ex necessitate* confined to courts of record. (*See 17 Barb., 424.*)

Erie General Term, January, 1855.

BOWEN, GREENE and BACON, Justices.

THIS action was commenced the 28th Nov., 1853, before Charles C. Severance, justice of the peace of the town of Concord in Erie County, by the plaintiff, Erastus D. Webster, against Nelson Hopkins and Lemuel B. Clark, and judgment rendered therein on the 9th December, 1853, against defendant Hopkins, for \$70 damages, and the costs; and of discontinuance against defendant Clark.

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The complaint was verbal, upon an account for printing election tickets for defendants, as alleged, at their request. Defendants did not appear before the justice. After all the testimony had been given to substantiate the plaintiff's claim, the cause was held open and continued by the justice until the next day, at 9 o'clock A. M., at which time the plaintiff appeared, and moved to amend his complaint, by complaining against Hopkins alone, and to discontinue the suit against Clark, the other defendant—which motion was granted by the justice, and the cause finally submitted. The justice thereupon rendered judgment of discontinuance as against the defendant Clark, and at the same time rendered judgment against defendant Hopkins, for \$70 damages, and \$4.51 costs.

Hopkins appealed to the county court in this form, to wit :

“ To the said plaintiff and the justice above named :

Sirs :—Take notice that the defendant, Nelson Hopkins, appeals to the county court of Erie County, from the judgment rendered in this action against him, in favor of the said plaintiff, on the 9th day of December, 1853, for damages \$70, and costs \$4.51 ; and the appeal is founded on the following grounds : that said judgment is *against law and evidence* ; and that the defendants failed to appear before the justice ; and that great injustice was done, by the judgment, to the appellant ; and that he has a satisfactory excuse for his default to appear ; all which he will show by affidavits hereafter to be served.”

The appeal was brought to argument (at a former term) and decided by the county court, at December term, 1854—Hon. JAMES SHELDON, county judge—who affirmed the judgment of the justice, and *held* that,

“ Whether the ground of appeal stated in the notice, that the judgment is *against law and evidence*, is sufficient to allow of an argument of the points which really exist, is a question which has not (he believed) been settled in any reported case.

“ If the judgment is *against law*, the appellant upon the argument assumes to state and argue the particular points in which

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it is against law. That is, he then avows the grounds of his appeal, and upon which he seeks a reversal.

"That a judgment is *against law*, is a general proposition which has no well defined or specific meaning, not pointing out wherein it is so, and requiring the respondent to make the same investigation and preparation, without any information from the appellant, as if the statute demanded only a notice of appeal to be served, without any grounds of appeal whatever to be stated therein.

"The same is true of the proposition, that a judgment is *against evidence*; but does a statement that it is against evidence *generally*, without specifying the particular, meet the provision of the statute, and effect the object designed to be effected by a specification of the grounds of appeal?

"A cause is at issue and tried before a justice, both parties being present. The plaintiff offers testimony clearly irrelevant or incompetent, and the defendant objects, but omits to state the grounds upon which his objection is founded. The appellate court would not allow an argument upon those objections; for it is well settled that such objections must be specific, and show the precise point of objection. This is for the double purpose of calling the attention of the judge to the point of the exception, and to afford the opposite party an opportunity of obviating the objection by additional proof. (20 *Johns.*, 357; 15 *Wend.*, 502; 5 *Barb.*, 598.)

"The court says to the appellant, in such a case, you was present and objecting, and it was for you to state the grounds of your objection then, in order to avail yourself of them here.

"When the defendant does not appear at the trial, he has the right, upon appeal, to raise the same objections to the competency, relevancy, or insufficiency of the testimony, as if he had been present and specifically objected. (7 *Johns.*, 18; 14 *Wend.*, 159.) But, in either case, there should be a time before the argument, when the respondent is informed of the grounds of the objections. In the former case, this is generally done by stating in the notice of appeal, as a ground thereof, that the justice erred in overruling each and every of the ob-

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jections taken by the appellant upon the trial. This is specific, and tells the respondent what errors of law the appellant alleges have been committed.

"But in a case like this, the respondent has no intimation, either upon the trial or in the notice of appeal. That the judgment is against the law, is a vague generality as far as he is concerned.

"That it is against the evidence, is different in its character. Where both parties appear and there is a conflict of testimony, this court cannot reverse the judgment; although it may seem that the testimony preponderated against the successful party. (8 *How. Pr. R.*, 377, and cases cited; see, also, *Moak agt. Folland*, 1 *Howard's Court of Appeals Cases*, 11.)

"In a case where the defendant failed to appear, the appellate court can reverse the judgment, if there is no evidence to support it; but if there is legal evidence tending to make out the plaintiff's cause of action, this court would not reverse, though it might well entertain doubts of the sufficiency. (*Same authorities*, and 7 *How. Pr. R.*, 64; 113.)

"That a judgment is against the evidence, is different from the assertion that there is no evidence to sustain it. In the latter case, the court would examine the return after argument upon that ground, and reverse the judgment if the proposition was found to be true; but can it be said that it is against evidence, when there is evidence tending to support it, or that in this case there is no evidence?"

The appellant alleged that the judgment was against the law and evidence; and after the above remarks, the judge proceeded to consider the latter branch, viz., that it was against evidence. And *held*, upon that branch of the case, that there was evidence enough to justify the judgment, at least so far that an appellate court, sitting merely in review, would not be authorized to reverse it as against, or for want of, evidence.

A. SAWIN, *for appellant*, said,

First. The county court, upon appeal from a judgment of

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a justices' court, where a return has been made by the justice, and the error complained of is not of *fact*, upon the argument of the case upon the return, (no motion being made to dismiss the appeal,) must hear and decide the cause upon the matters contained in the return. The object of the notice of appeal is to give jurisdiction to the court over the parties and the subject matter; and that accomplished, the notice of appeal dies, and is or ought to be buried. (*See provisions of the Code*, §§ 351 to 371.)

The error of the learned county judge, in his opinion, (printed in the case,) arose from an application of the decisions made upon motions to dismiss appeals on account of the omission to state the grounds of error in the notice of appeal, to the final hearing of the case upon the merits. (*See the case in 18 Wendell*, 550, and *2 Sandford*, 632.)

Besides, if the county judge could look at the notice of appeal on the argument, and adjudge it defective, the proper judgment to be rendered is not one of affirmance of the judgment, but of dismissal of the appeal.

Second. No court had power, before the enactment of the Code, on trial, to amend process or pleadings by striking out the name of one co-defendant, in an action brought against several parties upon a joint contract, or in such case to render judgment against one defendant and in favor of the other, except in case of a defence which operated as a personal discharge of one defendant, as infancy, &c. (*See 5 John.* 160; *5 Wend.* 229; *8 Cow.* 374; *20 John.* 153; *18 John.* 459, 478.)

Third. The provisions of the Code now allowing such amendments, are not made applicable to courts held by justices of the peace; and no legislature of any intelligence will ever confer upon those courts that power. (*See Code*, § 64, *sub.* 15.)

It follows, therefore, that the justice erred in giving judgment in favor of Clark and against defendant Hopkins, and for that reason the judgment should be reversed.

Fourth. If the justice regularly exercised the power of discontinuing Clark, then the action should have been tried as if originally Hopkins had been sole defendant; yet the strongest

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testimony—in fact, the only testimony—of the delivery of the tickets (except the admissions of Hopkins, which, taken as a whole, exonerate him from liability,) by plaintiff to any one, is to Clark. *That testimony was not withdrawn*, and remained, therefore, as evidence against Hopkins.

J. W. THOMPSON, *for respondent*.

BACON, Justice. The error into which, in my view of the case, the learned county judge has fallen, is in mistaking the office or function of the notice of appeal; and also the remedy which is to be applied where a defect exists in the notice. By the Code of 1848, if a party, against whom a judgment had been rendered, desired to review the proceedings and judgment by appeal, he prepared an affidavit, in which he was required to state the substance of the testimony and proceedings before the justice, and the grounds upon which the appeal was founded. If the opposite party deemed the affidavit to be erroneous or defective, he could correct omissions or misstatements therein by an affidavit on his part, and the appeal might be heard on those papers only. But the court had power, if the affidavits were contradictory or defective in material points, to direct the court below to make a return of the testimony and proceedings, and then the appeal was heard on all the original papers in the case, and which were to constitute the judgment-roll, to be filed in the cause.

By the Code of 1851, the provisions of which are now in force, the system was somewhat changed, and instead of the affidavit of the party desiring to appeal, he is required to serve a notice of appeal within a given period on the justice and the opposite party; which notice is to "state the grounds upon which the appeal is founded." The justice then makes the return, and upon that return the appeal is argued—(*Code*, § 364)—and the return on which the appeal was heard is to be filed with the clerk, and constitute the judgment-roll. The office of the notice of appeal, therefore, is to require and enable the justice to make a full and complete return of the entire proceedings in

the cause, and especially to call his attention to the matters which are particularly relied upon to reverse the judgment he has rendered. It gives the court jurisdiction of the parties and the subject matter; and having accomplished this end, its function is performed. It is no indispensable part of the papers upon which the appeal is to be heard in the court above; and it is no more necessary that it should appear in the printed case than the certificate of a justice of the supreme court, without which no judgment can be reviewed by appeal from the county to the supreme court. If, indeed, the notice is utterly defective in stating the ground of the appeal, the mode of taking advantage of that defect is by a motion to dismiss the appeal; and such was the practice under the old system anterior to the Code, where, in the affidavit which the party was required to make in order to obtain an allowance of the writ of *certiorari*, "the grounds upon which an allegation of error is founded," was to be stated. In the case of *People agt. Suffolk Com. Pleas*, (18 Wend. 550,) referred to by the county judge in his opinion in this case, that was the purport of the decision. The common pleas, on account of this defect, says BRONSON, J., "should have quashed the *certiorari*."

And to the same effect precisely is the case of *Williams agt. Cunningham*, (2 Sand. 632,) which was a motion to dismiss the appeal; and it was decided on the ground that the affidavit on which the appeal was founded did not make any specification of the errors which it was alleged the court below had committed.

This being the rule applicable to this case, it became the duty of the county court to look into the return, and see if the justice had committed any error in law which required a reversal of the judgment. The return shows that neither of the defendants appeared upon the trial; and that after the testimony had been closed, the cause was held open until the ensuing day, when the plaintiff again appeared and moved to amend his complaint by complaining against Hopkins alone, and discontinuing as to Clark, which motion was granted; and the court, thereupon, rendered a judgment of discontinuance as to

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Clark, and at the same time a judgment against Hopkins as sole defendant, for \$70, besides costs. This was clearly erroneous.

Before the Code, it is too clear to require the citation of an authority, that no court had power to amend the process or the pleadings in an action against two or more defendants on a joint contract, by striking out the name of a co-defendant, and rendering judgment against one, and in favor of the other, save in one or two exceptional cases, where a defence strictly personal, as infancy or bankruptcy, was allowed to prevail. The Code has altered the entire rule on that subject; but the sections which give that power to the courts are confined to actions pending in courts of record, and have no application to justices' courts.

The provisions in respect to amendments by adding or striking out the names of parties and the correction of mistakes, &c., are found in a distinct part of the Code, under title VI., which obviously, and in terms, has reference to the pleadings in civil actions, and is *ex necessitate* confined to courts of record, which are clothed with discretion in reference to the terms upon which amendments shall be allowed, and possess the appropriate machinery by which their orders may be enforced. It would be a very indiscreet legislation which should attempt to impart to justices' courts a power of this character and importance; and I am satisfied the authors of the Code could never have contemplated it in the original construction of the system; nor have the legislature, in the various revisions through which it has passed, ever extended it to this length.

The utmost extent to which the general provisions of the Code, in reference to actions and the parties thereto, &c., have been made applicable to proceedings in justices' courts, will be found in the 15th subdivision of the 64th section, which enacts that "the provisions of this act (the Code) respecting forms of action, parties to actions, the rules of evidence, the times of commencing actions, and the service of process upon corporations, shall apply to these courts." These all point to specific provisions in the Code on those particular subjects, and necessarily exclude from the action of these tribunals, those

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sections where the power of granting amendments is alone derived.

This conclusion commends itself to us as the only one which it would be reasonable and safe to adopt; and, in a recent case arising in the 4th district, the justices at general term seem to have arrived at the same result. In the case of *Gates agt. Ward*, (17 Barb. S. C. R., 424,) the justice, on the return day of the summons, amended the process so as to drop the name of one of the plaintiffs, and the cause was then adjourned. On the adjourned day the plaintiff moved to restore the name which had been dropped, and also to amend the complaint by entitling it in the name of both plaintiffs, and this motion was granted; and the cause was tried, and resulted in a verdict for the plaintiffs. The county court affirmed the judgment, but on appeal the supreme court reversed both judgments, holding that the court had no power, after allowing an amendment by striking out the name of a party, to restore it again when objected to by the defendant. Speaking, in the course of his opinion, on the power of the justice in respect to amendments, Mr. Justice HAND says, "I doubt the power of the court to grant the first amendment. Even this court, before the Code, though a mistake in the name of a party could have been corrected, could not as a general rule, especially after declaration, change the parties." Again, he says, "The rules prescribed by the Code, as to the necessary parties to an action, are applicable to them, so far as consistent with their constitution and duties. But the authority to amend by adding parties, is a different thing. It could not have been intended to give to them the same general power in this respect as is possessed by this court. The system is not adapted to the proper exercise of that power. Indeed, I think § 173 is inapplicable to these courts."

In these views I entirely concur; and the result is in this case, that the judgment of the justice, and of the county court, must be reversed.

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SUPREME COURT.

ARCHIBALD HUBBARD and HORACE CUTLER agt. THE NATIONAL PROTECTION INSURANCE COMPANY.

Where the defendants served a demand, in writing, that the trial be had in the proper county, naming it, and before the time for answering expired, the defendants served on the plaintiffs' attorney a copy of an answer, not verified, which was returned by the plaintiffs' attorney, on the ground that it was not verified; and the defendants thereupon moved that the place of trial be changed, and that their answer theretofore served stand as the answer in the action,

Held, that as regarded the motion to change the place of trial, it was not necessary to inquire whether the answer was well served, without being verified or not. If the plaintiffs laid the venue in the wrong county, it was their duty, on demand, to have changed it by amendment of their complaint, or otherwise, to the proper county. And the defendants might move thus to change it before issue joined, or at any time thereafter before trial, or before judgment, if no trial was had. And the plaintiffs, in such cases, should be charged with the *costs* of the motion. And on such a motion the plaintiffs cannot set up the ground of the convenience of witnesses—the defendants have no chance to answer it.

Where the convenience of witnesses is the ground of the motion, it should not be made till after issue joined, and after the place of trial has been fixed in the proper county.

The *residence* of a corporation created by the laws of this state, is in the county where its *general business* is transacted and located. The fact that such a corporation has an office in another county, where some of their business is done, does not change or affect their residence. (*See Conroe agt. National Protection Ins. Co.*, 10 *How. Pr. R.* 403.)

Where the plaintiffs' attorney verified the complaint in this way—"that the action is founded on an instrument for the payment of money only, which instrument was in his possession as attorney for the plaintiffs, neither of whom were residents of Erie county, where the attorney resided, nor was either of them capable of making the affidavit verifying the complaint."

Held, that the verification was insufficient, for the reason that the attorney did not set forth "his knowledge, or the ground of his belief," on that subject, which is required by the Code. (*See also Stannard agt. Mattice*, 7 *How Pr. R.* 4; and *Treadwell agt. Fassett*, 10 *id.* 184.)

Erie Special Term, March, 1855.

MOTION by defendants to change the place of trial from the county of Erie to the county of Saratoga, on the ground that

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“the county designated for that purpose in the complaint is not the proper county.”

The plaintiffs are non-residents of the state, and the defendants are a corporation located and having their principal place of business at the village of Saratoga Springs, in the county of Saratoga, and the venue in the action is laid in the county of Erie.

The summons and complaint were served January 17th, 1855, and the action is upon a fire-policy of insurance, issued by the defendants to the plaintiffs, to recover damages for the loss by fire of the property insured. The complaint is verified by the affidavit of the plaintiffs' attorney, in which affidavit he states, that the matters and things stated in the complaint are true, except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true; that the action is founded on an instrument for the payment of money only, which instrument was in his possession as attorney for the plaintiffs, neither of whom were residents of Erie county, where the attorney resided, nor was either of them capable of making the affidavit verifying the complaint.

The above is the substance of the whole affidavit. The time for the defendants to answer the complaint having been extended by an order until after February 17, 1855, they on that day served on the plaintiffs' attorney an answer which was not verified—which answer the plaintiffs' attorney returned, stating in a note accompanying it, that it was so returned for the reason that it was not verified. On the 23d of January, 1855, the defendants' attorney served upon the plaintiffs' attorney a demand, in writing, that the trial of the action be had in the proper county—to wit, in the county of Saratoga.

The defendants, in their notice of motion, in addition to the change of the place of trial, ask for an order, that the answer served, stand as the answer in the action.

The plaintiffs, by an affidavit read in opposition to the motion, show that the defendants have an office for effecting insurance in the city of Buffalo, county of Erie, at which office

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losses are frequently adjusted and settled—and that three material witnesses for the plaintiffs reside in Erie county.

J. THOMPSON, *for motion.*

J. S. GIBBS, *opposed.*

BOWEN, Justice. For the purpose of determining the proper place for the venue in actions by or against the defendants herein, their place of residence is in the county of Saratoga. In their affidavit for the motion, it is alleged that they are a corporation, located and doing business at Saratoga Springs, in Saratoga county, and that their charter provides that the village of Saratoga Springs shall be the place where the office of the company shall be located, and the general business of the company shall be carried on.

I take it for granted, that the defendants were incorporated under the general act passed April 10, 1849, (*Sess. Laws of 1849, p. 441.*) as I find no special act incorporating them. The 3d section of the act of 1849 requires companies proposing to incorporate themselves, to file with the secretary of state a declaration, containing a copy of the charter proposed to be adopted by them. The defendants' charter having prescribed where their general business should be done, they were not authorized to change the place; and the affidavit states that they are in fact located and doing business there. That must be considered their place of residence; and the fact that they have an office in the city of Buffalo, where some of their business is done, does not make them residents there. Their residence is where their general business is transacted. (*See Conroe agt. National Protection Ins. Co., 10 How. Pr. Rep. 403, and cases cited.*)

So far as regards the motion to change the place of trial, I do not think it necessary to inquire whether the answer was well served without being verified or not. If the venue is in the wrong county, the plaintiffs were in fault in laying it there; and on the demand being made, they should have changed it to

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the right county, either by an amendment of the complaint, or by an application to the court for an order changing it.

The fact that the defendants are in default for not answering, is no objection to the motion, when made by the defendants; as, by making the motion, they are doing what the plaintiffs themselves should have done.

Where the convenience of witnesses is the ground of the motion, it is now usually, and probably must be, made after issue joined; but where the venue is laid in a county not authorized by the Code, and the motion is to change it to the right county, I see no reason why it may not be made before issue joined, or at any time thereafter, before trial or before judgment, if no trial is had.

But I think the defendants were not bound to verify their answer. The Code (§ 157) requires, when a pleading is verified by any person other than the party, that the party verifying "shall set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party."

The affidavit verifying this complaint sets forth the reasons why it is not made by the party—to wit, that the action is on a written instrument for the payment of money only, which was in the possession of the attorney making the affidavit, and that the plaintiffs were non-residents of the county; but the attorney has not set forth in the affidavit "his knowledge, or the ground of his belief on that subject." This he should have done in order to have complied with the requirements of the Code; and for the failure in that respect the defendants had the right to treat the complaint as one not verified. (*Treadwell* agt. *Fassett*, 10 *How. Pr. Rep.* 184.) The cases of *Hunt* agt. *Meacham*, (6 *How. Pr. Rep.* 400,) and of *Mason* agt. *Brown*, (*id.* 481,) cited by the plaintiffs' counsel, are not authorities to the contrary, as in the former case the question now under consideration did not arise, and in the latter the affidavit verifying the pleading set forth the grounds of the belief.

The case of *Stannard* agt. *Mattice*, (7 *How. Pr. R.* 4,) in the place of being an authority to the contrary, sustains the posi-

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tion above taken. Mr. Justice PARKER, in speaking of the verification of a pleading by the attorney, in his opinion in the last case, says, that "in all cases the attorney must state, in his verification, his knowledge, or the grounds of his belief, and the reason why it is not made by the party."

The case of *Roscoe agt. Maison*, (7 How. Pr. R. 121,) holds, that where the attorney resides in a different county from the party, that is a sufficient reason for allowing the attorney to verify the pleading; and perhaps an inference may be drawn from the case that, under such circumstances, the verification may be made by the attorney, whether he has any knowledge of the facts stated in the pleading, or any grounds for believing they are true or not. But I do not think that the learned justice who wrote the opinion in that case, intended any such inference should be drawn therefrom. The attorney, in his affidavit, swore that the facts stated in the pleading were as well, and some of them more fully, known to him than to the party. Perhaps the justice considered that a sufficient statement of the knowledge of the attorney, or of the grounds of his belief. If otherwise, this case is in opposition to *Stannard agt. Mattice*, and *Treadwell agt. Fassett*, in the last of which cases I think that Mr. Justice HARRIS has given a correct exposition of the section of the Code under consideration.

The affidavit on the part of the plaintiffs, that they have material witnesses residing in the county where the venue was laid, is no answer to this motion. After the venue is changed to the proper county, the plaintiffs can move to change it back to Erie county, if the convenience of witnesses requires it. On this motion, the convenience of witnesses cannot be considered, or taken into account. The defendants have had no opportunity to be heard on that question, or at least to present any affidavit in relation to it. It may very well be, that a large majority of the witnesses in the cause reside in Saratoga county; and the defendants should have an opportunity to show it, if it be so. (*Park agt. Carnley*, 7 How. Pr. R. 355.)

That part of the motion asking for an order that the answer served stand as the answer in the cause, must be denied. If

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the answer was well served, the order is unnecessary; and should the plaintiffs proceed in the cause, disregarding the answer, the remedy is by motion to set aside the proceedings for irregularity. If it was not well served, the defendants must move the court, as a matter of favor, for leave to answer, notwithstanding the time to answer has expired; and the motion must be founded upon affidavits excusing the default, and showing a defence upon the merits. No merits are sworn to in the affidavits read in support of this motion.

The defendants are entitled to an order changing the place of trial to the county of Saratoga, as the county where it should have originally been laid. No costs are allowed to either party. I am inclined to think, that in cases of this kind, where a plaintiff, after a demand made, does not himself change the venue to the proper county, either by stipulation or an amendment of his complaint, or by an application to the court for that purpose, he should be charged with the costs of the motion when the defendant moves for the change, and that the costs should not abide the event of the action. But in this case, as the defendants have asked for more than they are entitled to, costs should not be allowed.

SUPERIOR COURT.

ISAAC SHERMAN and others agt. WILLIAM PARTRIDGE and others.

An order of *interpleader*, under § 122 of the Code, can only properly be made when the whole controversy turns upon the *right of property*: that is, upon the question whether the plaintiff in the suit, or the claimant whose substitution as the defendant is desired, is the true owner of the debt, fund, or other property for which judgment is demanded.

Where the plaintiff relies on, and has averred in his complaint, a special promise or contract to pay the value of the property sold to the defendant, and the same property is claimed by a third person as being the real owner, the latter

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cannot be substituted or made a defendant in the action, because it would deprive the plaintiff of his *legal remedy*; and might involve the sacrifice of his legal rights, without affording him any equivalent or compensation.

Where a plaintiff seeks to recover a debt arising upon *contract*, the claimant who seeks to be substituted a defendant, must, in the language of the Code, be "a third person, not a party to the suit, making a demand for the *same debt*." A demand by such third person for the identical property as owner, and that the plaintiff had no authority to make the sale to the defendant in the action, is not ground for an interpleader. As owner, he must seek his remedies against the defendant, or those into whose hands the property may have passed.

In such a case, if the defendant in the action has not rendered himself absolutely liable upon his promise, and the sale of the property made to the plaintiff, through whom defendant derived title, was fraudulent and void, the title of the true owner may be set up by the defendant as a full defence.

New-York Special Term, February, 1855.

THIS was a motion under § 122 of the Code, for the substitution of one Henry Delafield as the sole defendant, and the discharge of the present defendants from all liability to either party, upon their paying into court the sum of \$340.17. If this motion should be denied, the application then was, under the same section of the Code, that Delafield should be made a co-defendant.

The allegations of the complaint were, that one Philip N. Searl had sold to the defendants a quantity of logwood of the value of \$500; and, for a valuable consideration, had transferred and assigned to the plaintiffs his claim against the defendants arising from the sale. That the defendants, in consideration of this assignment, had expressly promised the plaintiffs to pay to them the price, or proceeds, of the logwood, which it was averred amounted to the sum of \$499.11; for which sum, the defendants having refused to pay upon request, judgment was demanded.

The application of one of the defendants, upon which the motion was founded, stated, (*inter alia*), that one Henry Delafield, a person not a party to the action, and without collusion of the defendants, demanded of them the proceeds of the logwood, alleging that it belonged to him, and that Searl had not

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the possession as owner, nor had any right or authority to sell the same, or assign the price thereof.

The affidavits, which were read on the part of the plaintiffs in opposition to the motion, stated the following facts:—That they had sold to Searl, for cash, a quantity of staves, and that he gave them this check for the price, the payment of which was refused. That he then gave them an order on the defendants for a definite sum, as the price of the logwood. That the defendants declined to pay the order, on the ground that the logwood had not yet been fully weighed, and that it was not certain that the price or proceeds would amount to the sum mentioned; but that they expressly promised to pay to the plaintiffs the whole proceeds when ascertained, provided the plaintiffs would obtain from Searl a general order or assignment of his claims. That such an assignment—which was set forth—was accordingly obtained, and that the plaintiffs, relying upon it, and upon the promise of the defendants, had omitted to obtain from Searl, who is now insolvent, a return of the staves sold to him, as they otherwise might and would have done.

It was also claimed, on the part of the plaintiffs, that the defendants had been indemnified against the plaintiffs' claim by Delafield.

I. T. WILLIAMS, *for plaintiffs.*

D. D. LORD, *for defendants.*

DUER, Justice. Taking into consideration the facts set forth in the plaintiffs' affidavits, and which I think might properly be given in evidence to sustain the averment in the complaint of a special promise, I am clearly of opinion that the motion for the discharge of the defendants, and the substitution of Delafield as the sole defendant, must be denied.

An order of interpleader, under the 122d section of the Code, can only be properly made when the whole controversy turns upon the right of property: that is, upon the question whether the plaintiff in the suit, or the claimant whose substitution as the defendant is desired, is the true owner of the debt, fund, or

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other property for which judgment is demanded. When the plaintiff insists, as in the present case, that the defendant, by a personal contract or otherwise, has rendered himself liable in all events for the debt sought to be recovered, and is precluded from setting up the title of a third person as a bar, it would be manifestly unjust to make the order, since, in the language of Lord COTTENHAM, in *Crawshaw agt. Thornton*, (2 M. & C. 19,) it would deprive the plaintiff of his legal remedy, and might involve the sacrifice of his legal rights, without affording him any equivalent or compensation.

Applying these remarks to the case before me, it is only in an action against the defendants themselves that the question, whether they have not rendered themselves absolutely liable to the plaintiffs for the price of the logwood, can be determined so as to secure to the plaintiffs the right of an appeal to the court of ultimate jurisdiction. To deprive them of their right by putting an end to this action in its present form, and substituting Delafield as the sole defendant, ~~seems to me~~ would be an arbitrary and unwarrantable exercise of judicial power. As against Delafield, the plaintiffs would only recover upon proof that Searl was the owner of the logwood, or had full authority to make the sale; and the question whether, even upon the supposition that Searl was not the owner, and had no such authority, the defendants were not bound to pay to the plaintiffs the stipulated price, would not be determined at all; and thus the plaintiffs might be deprived of the judgment to which, had the action retained its original form, they would have been entitled. Whether, if the plaintiffs shall succeed upon the trial in establishing the facts set forth in their affidavits, the defendants will be precluded from setting up the title of Delafield as a bar to a recovery, is a question upon which I am not to be understood as expressing or intimating any opinion. I only mean to say, that as the question of the absolute liability of the defendants is distinctly raised by the complaint and the affidavits, I have no right to decide it upon this motion, and thus to prevent its decision in the regular progress of the cause.

The provisions in § 122 of the Code, are founded upon the

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English statutes, (1st & 2d Will. IV, c. 58,) and hence the decisions upon that statute have with great propriety been referred to. They appear to have settled the rule, that it is only when no other question than the right of property is meant to be litigated, that an interpleader can justly be allowed. When it is alleged that the person who seeks to be discharged as a mere depository or stakeholder is liable upon any ground independent of the title, the application must be denied. *Crawshay* agt. *Thornton*, (7 Sim. 391;) *S. C.*, (2 M. & C. 1;) *Pearson* agt. *Cardon*, (2 Russ. & M. 606;) *Patorni* agt. *Campbell*, (3 Dowl. N. S. 397;) and *Lindsay* agt. *Barrow*, (6 C. B. Rep. 291,) differ in circumstances from the case before me, but in principle are not to be distinguished. As they appear to me to have been rightly decided, it is my duty to follow them.

Nor is it only upon the ground that has been stated that I must refuse, by substituting Delafield, to discharge the defendants. Had this action been brought by Searl himself, or by the plaintiffs merely as two assignees, I must still have said that the facts do not exhibit a case for an interpleader under a just construction of the Code. The plaintiffs seek to recover a debt arising upon contract; but Delafield is not "a third person—not a party to the suit—making a demand for the *same debt*," as the words of the Code require him to be, to justify an order for his substitution. As he *denies* that Searl had any authority to make the sale, his demand as owner is for the logwood itself or its value, which may be greater or less than the price agreed to be paid, and at any rate is not a debt of which, as such, "he may compel the payment." The words of the English statute do not at all differ in meaning from those of the Code; and the court of exchequer has held that, by their necessary construction, they preclude a purchaser of goods from calling his vendor to interplead with a third person claiming to be the owner. And one of the learned judges truly observed that, independent of the statute, an interpleader in such a case had never been allowed in a court of equity. (*Stanly* agt. *Sidney*, 14 *Meeson & Welsby*, 800.)

The provisions of the Code, like those of the English stat-

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utes, were certainly not designed to introduce new cases of interpleader, but merely to enable defendants, in cases where an interpleader is proper, to relieve themselves by a summary proceeding from the delays and expense of a formal action.

The alternative motion, that Delafield may be made a co-defendant, must also be denied. This is not an action for the recovery of real or personal property within the meaning of the Code. He has no interest that can be endangered or affected by any judgment that the plaintiffs may obtain ; nor is his presence necessary to a complete determination of the controversy. As owner of the logwood, he must seek his remedies against the defendants, or those into whose hands the property may have passed.

The objection, that the defendants have offered to pay into court a less sum than is demanded by the complaint, if other objections could be removed, I should by no means regard as fatal. I should then have no difficulty in directing a reference, or an issue for ascertaining the sum which the defendants, as the price of the logwood, are bound to pay.

I remark, in conclusion, that unless the defendants have rendered themselves absolutely liable, which is strenuously denied by their counsel, I do not see that they can be prejudiced by the denial of this motion. If the sale made by Searl was fraudulent and void, the title of the true owner, according to the decision of this court in *Bates agt. Stanton*, (1 *Duer*, 79,) may be set up by them as a full defence.

I shall deny both motions without costs, and with liberty to the defendants, if they shall be so advised, to commence a regular action for compelling an interpleader.

SUPREME COURT.

BARTHOLOMEW LOGAN agt. DANIEL THOMAS and JEREMIAH HALEY.

If a party to an action can, in any case, where he is sworn and testifies as a witness on his own behalf, recover *fees as a witness*, (which is doubted,) such fees cannot be taxed on the ordinary affidavit. To authorize the allowance, he should be required to show that he did not attend as a party; nor did not attend to conduct the trial of the cause; and that the sole purpose and intent of his attendance, was as a witness.

The proper affidavits for an allowance of costs on taxation, should be presented to the *taxing officer*; because, on appeal from the taxation, no other affidavits than those used before the taxing officer can be read on the appeal.

Erie Special Term, March 29, 1855.

MOTION by defendants for a re-adjustment of their costs, in the nature of an appeal from an adjustment thereof, by the clerk of Erie County.

The defendants having obtained a verdict in their favor which entitled them to a judgment for costs, presented a bill of their costs to the clerk for adjustment, in which bill were the following items:

"Three witnesses' travel fee from New-York to Buffalo, for June term, 423 miles each, \$101.52. Three witnesses' travel fee from New-York to Buffalo, for January term, 423 miles each, \$101.52. Three days' attendance as witnesses, June term, \$1.50. The same at January term, \$1.50."

The only evidence presented to the clerk, of the defendants' right to have the witnesses' fees taxed, or allowed, was the affidavit of their attorney, stating that the disbursements charged in the bill had been, or would be, necessarily incurred in the action; that Daniel Thomas, Jeremiah Haley and Alanson Lee were in attendance, as witnesses in the said action, at Buffalo, during the June term, 1854, and the January term, 1855, each one day; that the distance from New-York, where they lived,

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to Buffalo, by the "straitest" route, is 423 miles; and that the said witnesses were material on the trial of the cause, and were sworn and used as witnesses therein.

Thomas and Haley, two of the witnesses named in the affidavit, are the defendants in the action.

The plaintiff objected before the clerk, to the allowance of any fees for the travel or attendance of the defendants as witnesses; and the clerk sustained the objection, and deducted from the bill \$137.86, as so much charged therein for such travel and attendance.

The appeal is from the decision of the clerk sustaining the objection and making the deduction.

W. ROBERTSON, *for defendants.*

CHARLES DANIELS, *for plaintiff.*

BOWEN, Justice. The affidavit presented to the clerk on the adjustment of the costs, was insufficient to authorize the allowance of any travel fees of witnesses. It merely stated that the witnesses attended court and were examined as witnesses, and the distance of their residences respectively from the place of attendance. It should have stated that they traveled from their residences to the place where the trial of the cause was had, for the purpose of attending as witnesses. (4 *Hill*, 595; 5 *How. Pr. Rep.* 458.)

The plaintiff, however, only objected to the allowance of fees for the travel and attendance of two of the witnesses named in the affidavit, to wit, of the defendants. The clerk was, therefore, right in taxing fees for the one witness.

The affidavit, however, was sufficient to authorize the allowance of fees for the attendance of witnesses as charged, had not two of the witnesses whose attendance was shown, been the defendants themselves; and the question presented to the clerk, and on which he passed, was, whether a party to an action, when he introduces himself as a witness on his own behalf, should have witness' fees taxed for his own travel and

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attendance, under an affidavit such as was presented in this case.

In litigated cases, as it would appear this was, the parties thereto ordinarily attend the trials thereof when they do not expect to, and cannot, introduce themselves as witnesses. It is usually deemed necessary for them to do so; and if they attend as parties litigant, for the purpose of protecting their interests on the trial, they should not be allowed to recover fees as witnesses, although they might be sworn as such. In such cases, the inference would be, in the absence of proof to the contrary, that they attended as parties, and not as witnesses; that the primary and principal object of their attendance was to attend to their interests generally on the trial.

I very much doubt whether, in any case, a party, where he is sworn and testifies on his own behalf, should recover fees as a witness. But, if otherwise, such fees should not be taxed on the ordinary affidavit. To authorize the allowance, he should be required to show that he did not attend as a party, nor to attend to the conduct of the trial of the cause; and that the sole purpose and intent of his attendance was as a witness. In England, it has been held that a party, in such a case, may, under some circumstances, be allowed fees or expenses as a witness. (*Howes agt. Barber*, 10 *Eng. Law and Equity Rep.* 465.)

But Lord CAMPBELL, in giving the opinion of the court in the case cited, says:—"The simple fact of their (parties to actions) being examined as witnesses, must by no means be considered sufficient to establish a claim for their expenses as witnesses; and, if it appear that their attendance was unnecessary, or that they attended to superintend the trial of the cause, the claim ought to be rejected."

I think that the clerk, on the evidence before him, was right in making the deduction from the bill.

The defendants now present affidavits for the purpose of showing that they attended the trial solely as witnesses, and that they were material and necessary, and would not have attended had it not been necessary for them to have done so as

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witnesses. These affidavits further show that the suit was brought by the plaintiff as the assignee of a thing in action; and that notice had been given by the plaintiff, of his intention to examine his assignor as a witness on the trial, and that he was so examined.

But these affidavits cannot be considered on this appeal. The only question before the court is, whether the decision of the clerk, on the evidence before him, was right? These affidavits should have been presented to the clerk on the adjustment. Had they been presented to him, it is unnecessary to decide what his action thereon should have been.

The motion for re-adjustment must be denied.

SUPREME COURT.

WILLIAM L. LEWIS agt. ABRAHAM ACKER and EDMUND MURPHY.

A complaint which does not set forth facts sufficient to constitute a simple joint liability of the defendants, but a liability partly joint and partly and principally several, is fatally defective; and it is competent for the defendants to avail themselves of the objection in any stage of the suit—(on demurrer to the reply)

An answer by one of several defendants that the plaintiff agreed to take his pay, for work, labor, and materials claimed, in certain articles of property, which were purchased by the defendant for a sum exceeding the demand of the plaintiff, and which were delivered "as directed by the plaintiff," is a good answer, whether it can be considered a counter-claim or not.

And where such contract in the answer was denied in the reply, for two causes, first, because it was incorrect, and not a true statement of the whole transaction; and, second, because the plaintiff had not sufficient knowledge thereof to form a belief,

Held, that the reply was inconsistent—the second cause overruled the first.

For when a man alleges that he knows nothing about the matter, his positive assertion in reference to what it was, or was not, must go for nothing.

If such inconsistent allegations could at all avail the plaintiff, they must be construed as a denial from want of sufficient knowledge or information to form a

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belief. And if such form of denial is tolerated by the Code, it should not be extended beyond the limits prescribed by the court of chancery—to wit, that where acts, charged as the acts of the defendant himself, are of such a nature that he can be presumed to recollect them if ever they took place, a *positive answer* is required.

A hypothetical denial in a reply, of the performance of a contract made by the defendant himself, was never tolerated by any system of pleading.

Kings General Term, June, 1854.

THE complaint sets forth that the defendants are jointly indebted to the plaintiff, for work and labor done and performed, and materials furnished by him, upon and for a house owned by the defendant Murphy, for which the defendant Acker undertook and became responsible to pay the plaintiff, partly under a special contract, which is not set forth, and partly, as would seem, under an implied promise, resulting from the fact that some of the work and labor was performed, and a portion of the materials were furnished, at the joint request of the defendants.

A. JACKSON HYATT, *for plaintiff.*

JOHN REYNOLDS, *for defendant Acker.*

By the court—S. B. STRONG, Justice. Under our former system of pleading, this declaration would be radically defective, because, first, as to a principal part of the claim, it is not jointly against both defendants; and, secondly, it states that the contract was special, without setting forth what it was. The 274th section of the Code provides that judgment may be rendered against one or more of several defendants; but it has been held by Judge WILLARD, (*Murray agt. Gifford*, 5 How. Pr. R. 14,) that this does not authorize a judgment against one of several defendants sued on a joint contract. If it would, then a plaintiff might complain for a breach of one contract, and recover for the non-performance of another. Nor does it justify the union, in one charge, of incongruous claims. The Code has “said many things,” but I do not think it has gone to that extent. Possibly it is too late for the defendants to ob-

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ject to the omission to set forth the terms of a contract which the plaintiff admits to be special, and which creates the defendants' responsibility. As the complaint does not set forth facts sufficient to constitute a simple joint liability of the defendants, but a liability partly joint and partly and principally several, it is fatally defective, and it is competent for the defendants to avail themselves of the objection in any stage of the suit.

The defendant Acker answers, that the plaintiff agreed to take his pay in brick from the yard of Van Cortlandt; that the said defendant accordingly purchased a quantity of brick for a sum considerably exceeding the demand of the plaintiff at the yard designated, which were delivered "as directed by the plaintiff."

This may possibly be considered to be, and I think is, a counter-claim, although it is somewhat difficult to ascertain the precise meaning of that term as defined by the Code. The attempts of the codifiers to explain such term, resemble the argument of a celebrated English barrister, as reported by a proctor brother:—

"Mr. Parker made that darker,
Which was dark enough without;
Mr. Cook cited his book,
And the chancellor said, 'I doubt.'"

Whatever reason the learned chancellor may have had to doubt, I think there are as forcible causes of hesitation at the present day, to any one who has read the Code and the various decisions thereon. Possibly the counter-claim may be objectionable as being in favor of one only of the defendants; but if so, that is the consequence of the plaintiff's improper union of claims. However, there can be no doubt as to the sufficiency of the answer in the present case, by whatever name it may be called.

The reply, after quoting the statement in the answer as to the contract for payment in brick, and its performance, says, that it is so incorrect, "and not being a true statement of the whole transaction," the plaintiff denies the same; and further,

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that the plaintiff has not sufficient knowledge or information thereof to form a belief, and he therefore denies the same, and each allegation therein made; that the plaintiff also denies that the brick mentioned in the defendants' answer, or any part thereof, were ever delivered to him, or that he ever received any part of them; and he adds, that if he ever contracted, as defendant Acker alleges, the contract was broken by that defendant, and was consequently void, and of no effect.

To this reply the defendant Acker demurred.

The contract set forth in the answer is denied in the reply, for two causes: first, because it is incorrect, and not a true statement of the whole transaction; and, secondly, because the plaintiff has not sufficient knowledge thereof to form a belief. There is in this an apparent inconsistency, to say the least of it. The plaintiff first denies that the contract is as stated in the answer in positive terms, and then says that he has not sufficient knowledge or information to form a belief as to what he has thus denied. The reason last assigned certainly overrules the first; for when a man alleges that he knows nothing about the matter, his positive assertion, in reference to what it was or was not, must go for nothing.

If, then, these two inconsistent allegations can at all avail the plaintiff, they must be construed as a denial from want of sufficient knowledge or information to form a belief. This form of denial is tolerated by some decisions under the Code, but the right to make it should not be extended beyond the limits prescribed by the court of chancery, from which it was probably borrowed. The rule in that court was, that where acts, charged as the acts of the defendant himself, are of such a nature that he can be presumed to recollect them if ever they took place, a positive answer is required. (1 *Paige*, 404; 3 *id.* 103; *Litt. Sel. Ca.* 379; 2 *Sumn.* 228; *Voorhies' Code*, 128.)

The answer alleges a verbal agreement, for the payment of work to be done by the plaintiff, to which he was a party, and that it was made in June. The year does not appear; for, strange to say, no year is mentioned in any of the pleadings. It is inferable, however, that it was in 1852, as the suit was

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instituted in October in that year. Surely, it would be a perversion of the privilege granted by the Code, to allow the plaintiff to make a denial on the allegation of a want of sufficient knowledge or information to form a belief under such circumstances. It would sanction a mere mockery.

But the inconsistency does not end here. The reply, after denying the contract, says, the brick mentioned in the answer were not delivered to him. What brick were mentioned in the answer? None, certainly, except those specified in the alleged contract. This, then, was an implied admission of what had been previously denied. Whatever it may be deemed, it is no answer to the averment that the brick were delivered as directed by the plaintiff. It is a mere evasion—not a denial. Then comes the allegation, that if the alleged contract was made, it was not performed. This, if it is to be considered as a separate reply,—and that is warranted by our present anomalous state of pleadings,—is in violation of a familiar rule, that you cannot deny performance of a contract without admitting the contract itself. Special pleas (and this partakes of their nature) always admit the truth of the statements, which are not thereby expressly traversed. Logic, in a case circumstanced like that under consideration, teaches the same rule.

The contract set forth in the answer was made, or it was not. If it was made, then an allegation of non-performance by the defendant was essential: if it was not made, a denial was the appropriate defence, and an averment of non-performance was unnecessary and absurd. A hypothetical denial of the performance of a contract, recently made by the defendant himself, was never tolerated by any system of pleading.

The judgment rendered at the special term should be affirmed, with costs.

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SUPREME COURT.

THE TROY & BOSTON RAILROAD COMPANY agt. GEORGE M.
TIBBITS.

There is now no restriction upon the power of the court, before trial, to allow amendments to pleadings, even though the effect be to change entirely the whole cause of action, or the grounds of defence. It is only when a party seeks to amend his pleadings *after trial*, that the court are prohibited from allowing an amendment that would substantially change the cause of action or the defence. (*Code*, § 173; 7 *How. Pr. R.* 294.)

But where a trial has been had, and subsequently set aside, and a new trial ordered, the court has the same power to allow the parties to amend their pleadings as though the action had never been tried.

Where the verdict and judgment of the plaintiffs, at the circuit, were set aside by the general term, and a new trial ordered, with an extra allowance of \$100 to the defendant upon the trial,

Held, that the *terms* upon which the plaintiffs were entitled to amend their complaint, by changing substantially the ground of their action, should be, the payment of the costs of the defence to the present time to be taxed, and the costs of opposing the motion; but not the \$100 extra allowance.

The extra allowance is only authorized upon recovery of a judgment. The judgment in this case had already been set aside.

Albany Special Term, April, 1855.

MOTION to amend complaint.

On the first of May, 1849, the defendant, with sundry other persons, signed an instrument whereby, after reciting that the legislature had passed an act to determine the public utility of a railroad from the city of Troy to the easterly line of the county of Rensselaer, and to authorize the organization of a corporation for that purpose, they agreed to take the amount of stock placed opposite their respective names, upon certain conditions therein specified. The amount thus subscribed by the defendant was \$20,000.

The defendant, and other persons who had signed the instrument, in November following, executed the necessary articles of association, for the purpose of becoming incorporated under

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the general railroad act. The stock subscribed by the defendant, upon executing these articles, was fifteen shares of \$100 each.

The company having been duly organized and incorporated, the defendant paid the full amount of his last subscription, but refused to pay the calls made by the directors for the subscription of May, 1849. This action was brought to recover that amount.

In their complaint, the plaintiffs, after stating the facts above set forth, claimed that, by virtue of the instrument executed in May, 1849, the defendant became liable to pay the several calls which had been made for the payment of his subscription of \$20,000. Upon the trial of the action, it was held, that the plaintiffs were entitled to recover against the defendant the amount of his subscription made in May, 1849. The judgment rendered against the defendant at the circuit was reversed, upon appeal to the general term, and a new trial awarded.

The plaintiffs now moved to amend their complaint, by adding an allegation that the subscription for \$20,000 was made with the intent, on the part of the defendant, and others who executed the instrument, that it should be delivered to the commissioners for opening books of subscription under the 5th section of the general railroad act; and that, when so delivered, it should be received as a subscription to the capital stock of the plaintiffs, with the same effect as if signed after the books were opened. That after the plaintiffs became incorporated, the instrument signed by the defendant was delivered to the commissioners, by the consent of the defendant, and was, with his consent, received and acted upon by the commissioners, as a subscription by him for \$20,000 of the capital stock of the plaintiffs. That other persons acted upon it, and subscribed to the capital stock of the plaintiffs with the knowledge of the defendant, believing that the defendant was a subscriber for \$20,000 of the stock; and that the book containing this subscription was, with the consent of the defendant, delivered to the plaintiffs, and accepted and received by them as a subscription to the capital stock made by him after they were incorpo-

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rated; and that the defendant, being a director, concurred with the other directors in acting upon the subscription as a valid subscription to the capital stock of the plaintiffs, and in treating it as a subscription made, executed, and delivered after the plaintiffs were incorporated; and that the plaintiffs commenced their road, and expended large sums of money, relying upon the subscriptions of May, 1849; and that other subscribers for stock have been induced to act on the subscription, believing it to be valid.

Other amendments were proposed, to adapt the complaint to this theory of the case. Affidavits were read in opposition to the motion, denying the truth of the allegations proposed to be inserted in the complaint.

A. B. OLIN, *for plaintiffs.*

W. A. BEACH, *for defendant.*

HARRIS, Justice. I regard it as very much a matter of course to allow any party to shape his own pleadings to suit himself, and for that purpose to permit him, at any time before trial, to amend his pleadings so as to present his own views of the questions to be litigated, upon such terms as may be deemed equitable. There is now no restriction upon the power of the court to allow such amendments, even though the effect be to change entirely the whole cause of action, or the grounds of defence. It is only when a party seeks to amend his pleadings after trial, that the court is prohibited from allowing an amendment which would substantially change the cause of action or the defence. (*See Code, § 173; Beardsley agt. Stover, 7 Howard, 294.*)

In this case, though there has been a trial, yet as that trial has been set aside, and a new trial ordered, the court has the same power to allow the parties to amend their pleadings as though the action had never been tried. And, besides, though it is proposed by the amendments to present a very different question for litigation, yet the subject matter of the action will be the same. The same transaction will yet be the foundation

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of the action. The theory of the plaintiffs' case will be changed, but the claim itself will remain substantially the same.

Under these circumstances, I think the motion should be granted.

It remains to inquire what should be the terms upon which the amendment should be allowed. The defendant has, thus far, been successful in the action. He has the judgment of the court in his favor, upon the issue which the plaintiffs chose to tender him for trial, now the plaintiffs seek to change their ground, and to litigate a new question with him, in respect to the same subject matter. New issues will be made. A new line of defence will be required.

As the matter now stands, the defendant is entitled to the costs of a successful defence. It would be obviously unjust to deprive him of this advantage, by allowing the plaintiffs to change entirely the ground of their action. The plaintiffs should, therefore, as a condition upon which the amendment should be allowed, be required to pay the costs of the defence to the present time to be taxed, and the costs of opposing this motion. An extra allowance of \$100 was made to the defendant upon the trial, but I do not think it can properly be included in the costs to be allowed upon granting this application. The extra allowance is only authorized upon the recovery of a judgment. Here the judgment has already been set aside. In this respect, the case is distinguishable from that of *Ellsworth agt. Gooding*, (8 How. 1.) In that case the application was for a new trial. The plaintiff had recovered a judgment—an extra allowance had been made, and this had become a part of the judgment. The question before the court was, upon what terms the judgment should be vacated and a new trial ordered. It was quite competent for the court, in such a case, to require the payment of all the costs, including the extra allowance, as a condition of granting the motion. But in this case a motion for a new trial has already been granted. The order for an extra allowance has become inoperative. It would, therefore, be improper, to say the least, to

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make the payment of such allowance a condition of granting leave to amend.

As a further condition of granting this motion, the plaintiffs should be required to stipulate, if desired by the defendant, that the cause may be placed upon the calendar, and, if the issues shall be completed in season, that it may be tried, at the ensuing circuit, in the county where the venue is laid.

SUPREME COURT.

ABRAM BEDELL and others, executors, &c., of John Sanderson, deceased, agt. HUGH M'CLELLAN, CORNELIUS HUSTED, and others.

The holder of a mortgage has a right to make his own election as to the mode in which he will enforce its collection; and he cannot be restrained from proceeding in his own way merely because a subsequent incumbrancer prefers a different remedy, or even offers to collect the mortgage for him. He cannot be restrained by injunction, unless there be some good legal reason for interference.

As a general rule, an injunction will not be granted when the plaintiff has another remedy, of which he can avail himself without restraining the defendant.

A junior mortgagee, because he has first commenced proceedings of foreclosure by filing complaint and notice of *his pendens*, has no right to interfere by injunction to arrest a prior mortgagee in his proceedings to foreclose his mortgage by advertisement, covering a portion of the same premises, especially where the prior mortgagee had, in fact, published his advertisement previous to the service of the summons in the first case.

If the junior mortgagee has a right, in such a case, to stay the prior mortgagee, and assume the control of his mortgage, the same right would belong to every subsequent incumbrancer, by judgment or otherwise.

Albany Special Term, June, 1855.

THE complaint in this action was filed on the 21st of May last, for the purpose of foreclosing a mortgage, executed on the 13th Dec., 1833, by Hugh M'Clellan to John Sanderson, deceased, to secure the sum of three thousand dollars. On the same day a notice of *his pendens* was filed, and a summons and

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copy complaint were delivered to the sheriff, which was served on the 23d of May last.

The defendant, Husted, has a prior mortgage, covering one of the farms embraced in the plaintiffs' mortgage. The mortgage of Husted was executed by Hugh M'Clellan to said Husted on the 1st of May, 1832, to secure the payment of three thousand dollars and interest. The defendant Husted has proceeded to foreclose his mortgage by advertisement; and his first notice was published and dated on the 22d of May, 1855. The papers necessary to foreclose by advertisement were made out by Husted's attorney, and forwarded to the printer on the 19th day of May, 1852.

The complaint in this action admits Husted's mortgage to be a prior lien, and prays for a sale, and that Husted's mortgage be first paid, and the surplus, if any, applied on the plaintiffs' mortgage.

The plaintiffs' applied on notice to Husted's attorney for an injunction order, restraining the defendant, Husted, from proceeding to sell under his notice, and staying his proceedings till a sale could be obtained in this action.

J. SANDERSON, *for plaintiffs.*

P. CAGGER, *for Husted.*

PARKER, Justice. The question presented for decision is, whether, upon the facts in this case, the plaintiffs are entitled to an injunction order, restraining Husted's proceedings to foreclose by advertisement, for the purpose of enabling the plaintiffs to make sale of the property for the benefit, first of Husted and then of the plaintiffs.

The plaintiffs rely upon the case of *Davis agt. Briggs*, (3 *How. Pr. R.* 65.) In that case, a subsequent mortgagee had commenced a foreclosure by action; and a prior mortgagee was made a party, and had put in his answer, admitting the material facts alleged in the bill. Briggs, the mortgagor, put in an answer denying the rights of the complainant; and the prior mortgagee having become impatient of the delay caused

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by the litigation between the complainant and Briggs, commenced a statute foreclosure.

If that decision can be sustained at all, which I think doubtful, it is because the second mortgagee had first commenced his suit, and the prior mortgagee, being made defendant, had answered; the court having thus obtained jurisdiction of the whole matter before the commencement of the statute foreclosure. But this application has no such ground to rest upon. Husted's advertisement was first published on the 22d of May, and before this action was commenced. It is true, the complaint and notice of *lis pendens* were filed on the 21st of May. But the action was not commenced till the service of the summons, (*Code*, § 147,) which was on the 23d as to M'Clellan, and 26th as to Husted; and not till that time did the court acquire jurisdiction. (*Code*, § 139.) It is only as to purchasers, or subsequent incumbrancers, that the notice of *lis pendens* is constructive notice from the time of filing. Husted, so far from having submitted, as in the case cited, to make his claim in this action, had elected to make it in a different form, and had sent his notice of sale to the printer as early as the 19th of May.

The holder of a mortgage has a right to make his own election, as to the mode in which he will enforce it; and he cannot be restrained from proceeding in his own way, merely because a subsequent incumbrancer prefers a different remedy, or even offers to collect the mortgage for him. He cannot be restrained by injunction unless there be some good legal reason for interference. When it is said that a court of equity has power to restrain proceedings at law when they must necessarily work injustice, (3 *How. Pr. R.* 65; 2 *Story's Eq. Jur.*, § 885,) it is not meant that an injunction will be issued to suit the convenience of the moving party, or to give him the control of the sale, or to gain time to raise money, or to wait for an expected rise in the market value of property. It is easier to say in what cases an injunction cannot be allowed, than it is to lay down a general rule that shall cover all cases for the granting of an injunction.

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The occasions for granting an injunction are said by Story to be "almost infinite in their nature and circumstances." (2 *Story's Eq. Jur.*, § 885.) They include not only all cases where, by accident, mistake, or fraud, a party has obtained an unfair advantage; but a great number of other cases, where the proceeding of the defendant, unless restrained, will conflict with an equitable right of the plaintiff, or deprive the plaintiff of an opportunity of enforcing a legal claim. If, for example, Husted's mortgage covered several lots, on one of which the plaintiff had a subsequent mortgage, and there was an equitable reason why the other lots should be first sold by Husted, there would be good ground for enjoining him against selling first the lot on which the second mortgage was a subsequent lien. But Husted's mortgage covers but one lot, upon which it is the first lien, though the plaintiffs' mortgage covers other lots also.

It is not a reason for interfering, that the time advertised for the sale is at a season of the year when the property may not sell to the best advantage, or that the sale will take place before the plaintiffs can get judgment; for Husted has a right to fix his own time, and to have as early a day as the statute allows. To sell on that day will not necessarily take away any legal or equitable right of the plaintiffs. Those can be protected by the plaintiffs, by attending and bidding at the sale, or by taking an assignment of the mortgage before the sale, as the plaintiffs have a right to do on paying to Husted the amount due. (*Pardee agt. Van Auken*, 3 *Barb. S. C. R.* 534.) As a general rule, an injunction will not be granted when the plaintiff has another remedy, of which he can avail himself without restraining the defendant.

It does not alter this case that the plaintiffs offered to pay Husted's costs of proceeding to advertise. The plaintiffs could not, by such an act, obtain a right to control the foreclosure of Husted's mortgage. That right belonged to Husted alone.

If, on the facts in this case, the plaintiffs have a right to stay Husted, and assume the control of his mortgage, then the same right belongs to every subsequent incumbrancer; and the sub-

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sequent incumbrancers, by judgment in this case, or any one of them, have also a right at pleasure to stay the proceedings on both the mortgages, that a sale may first be had on one of their executions. There can be no good reason for a distinction between the plaintiffs' right and those of any subsequent judgment-creditor. If any such right exists, there must be an advantage in being a later rather than a prior incumbrancer, a right hitherto not generally recognized by creditors.

The premises mortgaged to Husted are of barely sufficient value to pay Husted's claim. If an injunction should be granted, and M'Clellan, or any of the numerous incumbrancers subsequent to Husted, should litigate the plaintiffs' mortgage, the delay would greatly endanger the collection of Husted's mortgage. Or if, at any time in the progress of the litigation, the mortgagor should pay up the plaintiffs' mortgage, the action would be at an end, and Husted would be compelled to commence his proceedings anew, and thus incur equal delay and risk of collection.

In any view in which this application is regarded, the reasons are abundant against it, and the motion must be denied, but without costs.

SUPREME COURT.

CHARLES BENEDICT and WIFE agt. WILLIAM N. SEYMOUR and others.

Formerly, in actions for partition, the ordinary practice, when a release could not be obtained from the wife, was, to pay the money, set apart for her dower, into court. But by the acts of 1848-9, such persons were, in effect, declared, in respect of property and its management, to stand precisely upon the same footing as "single females," and with the same power of disposal "as if they were unmarried."

It seems, therefore, that money, awarded to the wife on partition, need not be paid into court.

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Money paid to a married woman is not, as formerly, her husband's property, nor subject to her husband's disposal, "nor liable for his debts." His legal control over it is gone. And it may be considered doubtful, in such cases, whether the court can interfere on the question of undue influence by the husband.

It would seem to be the duty of the judiciary to reverse the former common-law presumption, and to assume (unless the contrary be expressly proved) that every married woman, of full age, is as "competent to manage and control" as any man or "single female."

It seems that the act of 1848, while it left to the married woman her common-law right of dower in her husband's property, took from the husband, intentionally or otherwise, his common-law *right of curtesy* in that of his wife. So far as this act operates on existing marriages and existing property, it impairs the obligation of contracts, and is, on that ground, unconstitutional and void. It is valid, however, as to subsequent marriages, and as to subsequently acquired property under prior marriages. Hence the necessity, in all cases involving the claim of tenancy by the curtesy, of stating the *dates* when the marriage took place, and when the property sought to be partitioned was acquired.

The *value* of an inchoate tenancy by the curtesy, depends not only upon the principles applicable to life annuities and survivorships, but upon the *fact of issue*, and if none, upon the *likelihood* of issue.

New-York Special Term, 1854.

MOTION for partition and sale.

The facts will sufficiently appear in the opinion of the court.

— — — — — *for plaintiff.*
 — — — — — *for defendant.*

ROOSEVELT, Justice. This case presents several difficulties, arising mainly out of the altered state of the law in relation to husband and wife. And as a sale is asked for, instead of an actual partition of the undivided interests of the parties, and as the rights of infants as well as of married women are to be affected, the questions which suggest themselves to the mind of the court demand the more careful consideration.

The counsel for the plaintiffs seems to take it for granted, in the draft decree which he has submitted for approval, that married women are still subject to their ancient disabilities, and married men entitled to their ancient prerogatives. In both aspects this assumption is erroneous.

By the act of April 28th, 1840, for the better securing of the
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interests of married women, in lands sold under decrees in partition, it was provided, that unless they chose to execute releases to their husbands, their inchoate right of dower, in such cases, should be valued, and a corresponding portion of the proceeds invested or paid over, as the court should deem best, to secure and protect the rights and interests of the parties. Under this act the ordinary practice, formerly, when a release could not be obtained from the wife, was to pay the money set apart for her dower into court.

By the acts of 1848-9, however, for the better protection of the rights of married women, such persons were, in effect, declared, in respect of property and its management, to stand precisely upon the same footing as "single females," and with the same power of disposal "as if they were unmarried." Why, then, should money awarded to them be any longer paid into court? Why, in other words, should the chamberlain of the city, without their request, be made their trustee?

Money paid to a married woman is not, as formerly, her husband's property, nor subject to her husband's "disposal," nor "liable for his debts." His legal control over it is gone. And as to undue *influence*, no woman of the present day is presumed so deficient in strength of mind, as to need protection against the persuasive potency of any husband. The law regards her capacity to resist as in no wise impaired by her promise to obey, and assumes that she can say, no, quite as freely, and quite as energetically, after marriage, as while she was only "a single female." True, the amending act of 1849 indicates, on this point, some slight misgiving, and provides that where an express trust has been created for a married woman, it shall not be discharged, even "on her written request," unless a justice of the supreme court, after due examination and inquiry, shall accompany such request with his "certificate," to the effect—for such I am inclined to think, although not very clearly expressed, was the intention of the act—that he is satisfied with "the capacity" of the lady "to manage and control." But even this qualification, confined, as it is, to particular trusts, and bearing on the present case only as a source of analogy, is,

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in a great degree, neutralized by the spirit of a subsequent statute, passed on the 30th of June, 1851, which gives to all married women, who are stockholders or members of any corporation, the absolute right "to vote at any election for directors or trustees,"—and this without consulting either their husbands, or a justice of this or any other court.

After these strong and unequivocal legislative indications, it would seem to be the duty of the judiciary to reverse the former common-law presumption, and to assume (unless the contrary be expressly proved) that every married woman, of full age, is as "competent to manage and control" as any man or "single female."

Next, as to what has been called the curtesy estate of the husband. By the common law, every husband, in right of his wife, immediately on the marriage, except where a settlement was agreed upon, became seized of his wife's houses and lands, during their joint lives, and (if issue followed) during his own life.

The act of 1848, while it left to the married woman her common-law right of dower in her husband's property, it would seem, took from the husband, intentionally or otherwise, his common-law right of curtesy in that of his wife. As marriage, whatever may be its other attributes, is, in law, a civil contract, it is obvious that this act of the legislature, so far as it operates on existing marriages and existing property, impairs the obligation of contracts, and is, on that ground, unconstitutional and void. (*White agt. White*, 5 Barb. 474.) As to subsequent marriages, however, and as to subsequently acquired property under prior marriages, its validity, I presume, whatever may be said of its justice, cannot be disputed. Hence the necessity, in all cases involving the claim of tenancy by the curtesy, of stating the dates when the union between the parties was formed, and when the property sought to be partitioned was acquired. Without these elements, it is impossible for the court to determine—as they are called upon to do—the rights of the parties. And even when these elements are supplied, if they show a constitutional right in the husband beyond the

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reach of the legislature, its duration, and of course its value, still depends on the further circumstance, generally overlooked, of issue born. With issue, the estate is for the husband's own life; without issue, it cannot extend beyond his wife's. Its value, therefore, depends not only upon the principles applicable to life annuities and survivorships, but upon the *fact* of issue; and if none, upon the *likelihood* of issue. In this respect it differs materially from the inchoate dower of the wife. The widower, after his wife's death, takes only on the condition of paternity—the widow, after her husband's, whether she has been a mother or not.

The greater or less likelihood of issue, in any given case, must depend again, it is obvious, not only upon the principles applicable to life and survivorship, but upon facts and circumstances not usually taken into consideration by the law. One extreme case it is true, has been admitted, and that only under the system now abolished, of entailment. An estate-tail, "after possibility of issue extinct," was a recognized head of the ancient jurisprudence. Short of impossibility, there was no case that I am aware of. How, then, in other cases, is an inchoate tenancy by the curtesy to be valued? In other words, what sum, in gross, as a substitute for the probable prospective income, is to be allowed?

On this, and other points suggested, I wish to hear the counsel for the parties before adopting the draft decrees which have been submitted in this and some other cases.

Judgment suspended accordingly.

COURT OF APPEALS.

BEECHER, respondent, agt. CONRADT, appellant.

Where the respondent has omitted to avail himself of the neglect of the appellant in procuring the *return* of the clerk within twenty days after the appeal was perfected, until after the return has been made, and has, after the filing of the return, noticed the cause for argument, the objection that the return was not made in time is *waived*.

An objection that the return does not contain a copy of the notice of appeal, and also that the printed copies of the case served do not contain a copy of the notice of appeal, or a copy of a certificate of the clerk of the court below, that the papers returned by him are correct copies of the judgment-roll, &c., are omissions which this court will, on motion, allow the appellant to supply, without dismissing the appeal.

Where the record shows an actual determination made at general term, although it does not affirmatively appear that the case was brought there by *appeal*, this court will not go behind the record to inquire whether there was a judgment at special term from which an appeal had been taken, but presume that the case was regularly at general term by appeal.

March Term, 1855.

THIS is a motion on the part of the respondent, to dismiss the appeal on the following grounds:—

1. That the return by the clerk was not made within twenty days after the appeal was perfected.
2. That the return, as made, does not contain a copy of the notice of appeal.
3. That the printed copies of the case served by the appellant do not contain a copy of the notice of appeal, or a copy of a certificate of the clerk of the court below, that the papers returned by him are correct copies of the judgment-roll, &c.
4. That the judgment appealed from has never been passed upon by the general term of the supreme court, and that no appeal can be taken in the first instance—from said judgment to this court.
5. That no motion for a new trial could be granted by the supreme court upon a bill of exceptions.

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The judgment from which this appeal is taken was entered in Oneida county, on the 10th of February, 1853, and is in the following words:—

“This action having been tried before Philo Gridley, one of the justices of this court, at a circuit court held in and for the county of Oneida, &c.; and the said judge having then and there rendered judgment in favor of plaintiff against the defendant for the sum of \$750.60, with costs to be taxed; and the defendant having excepted to the ruling of the judge on said trial, and having made a bill of exceptions, and thereon moved a new trial, and this court having at the January term thereof, held at the city of Utica in the year 1853, denied said motion, *which said motion was made and argued at a general term* of this court, and the decision of the court thereupon being filed, whereby a new trial in said action is denied, now, on motion, &c., it is *ordered and adjudged, &c.*”

CHARLES A. MANN, *for respondent.*

SAMUEL BEARDSLEY, *for appellant.*

By the court—DEAN, J. As the respondent has omitted to avail himself of the neglect of the appellant's attorneys in procuring the return of the clerk within twenty days after the appeal was perfected, until after the return has been made; and especially as he has himself, since the return was made, noticed the appeal for argument, he must be held to have waived all objection on that account.

The second and third grounds of motion are for omissions in the return and copies of the printed case, which this court would, on motion, allow the appellant to supply, and the respondent having waited two years before moving to dismiss on account of such omissions, the appellant must now have leave to perfect the return, and copies of the case already served, and without costs.

The reason for the motion, fourthly named, that the judgment appealed from has never been passed upon by the general

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term, is of a nature, as it goes to the jurisdiction of this court, which can not be waived by any lapse of time.

This is an appellate court only, and has jurisdiction to review upon appeal, every actual determination made at a general term, by the supreme court, in a judgment in an action commenced therein. (§ 11 of *Code*.) This is such an action. It remains only to ascertain whether there has been an actual determination of the case made at the general term. The judgment-roll is full and explicit on this point. It says, that the motion for a new trial was made and argued at a general term of the supreme court, and that said court "ordered, adjudged," &c. This certainly must be held to be a judgment on an actual determination made at a general term. It is true, that the language used might imply that the decision of the supreme court was on an original motion, and not on appeal. But the appellant did not enter up the judgment, and cannot, on a motion to dismiss the appeal, be concluded by its language, unless it is so clear against him as to show that the court below had no jurisdiction in the premises. I think we are bound to presume, although it does not affirmatively appear by the record, that the case was regularly at the general term by appeal, and that we cannot go behind the record, which shows an actual determination at general term, to inquire whether there was a judgment at special term from which an appeal had been taken. The motion to effect that object should have been made in the court below, before the final judgment on the merits at general term.

The fifth ground of motion is intended to reach the question lastly discussed, viz., the want of precise and technical language in the entry of the judgment of the general term. If there was a bill of exceptions and an appeal to the general term, then the general term, on such appeal, could grant or refuse a new trial on such bill of exceptions, and from such determination an appeal to this court could be taken.

We are to presume that there was a regular appeal to the general term. At any rate the respondent cannot, on this mo-

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tion, have the appeal dismissed for any reason stated in his notice of motion.

The motion must, therefore, be denied. But, as the return and printed copies of the case must be amended, leave is granted to the appellant to make such amendments, without costs to either party on this motion.

SUPREME COURT.

STEPHEN WOODS and WIFE agt. SUSAN THOMPSON and others.

A married woman is obliged to prosecute by *next friend* only where her husband cannot be joined with her—meaning evidently where she claims in opposition to him.

Although, when the action concerns her separate property, she may sue alone, and, as a necessary consequence, is bound by the judgment. It does not alter her liability in this respect if the husband is joined with her as a co-plaintiff, when they have not adverse interests in relation to the subject of the claim.

Therefore, where the husband and wife bring the action, but the wife verifies the complaint, and is the principal actor in the suit, no next friend for the wife is necessary; and it is no objection that the husband is joined, as it can not exempt her from the liability of being bound by the judgment, as when she sues alone.

New-York Special Term, January, 1855.

MOTION for appointment of next friend.

J. J. TOWNSEND, *for motion.*

E. R. BOGARDUS, *opposed.*

CLERKE, Justice. Before the Code, a married woman must have sued jointly with her husband, both in equity and at law, unless she claimed a right in opposition to him; and the suit was declared to be the suit of the husband only; so that a decree or judgment would not have bound the wife. This was

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probably in analogy with the principle of the common law, that all acts performed by the wife during her coverture are void.

But now, by the Code, (§ 114,) "when the action concerns the separate property of the wife, she may sue alone," and as a necessary consequence, she is bound by a judgment in the action.

Does it alter her liability in this respect, if the husband is joined with her as a co-plaintiff?

It is always proper, though not always necessary, that the husband should be joined with the wife in prosecuting her claims, when they have not adverse interests in relation to the subject of the claim.

It has been decided in many cases, indeed, that the husband ought not to join with the wife as a co-plaintiff, in a suit relating to her separate property; but this was on the ground that he might have filed the bill without her knowledge or consent; and in such cases, the court has, on demurrer, ordered the name of the husband to be struck out as plaintiff, and inserted as defendant. But, in this case, the wife verifies the complaint, signifying not only her full knowledge of its contents, but her consent that the action should be commenced. *She is, therefore, the principal actor in the suit;* and the mere circumstance that her husband is a co-plaintiff, cannot exempt her from the liability of being bound by the judgment, to which she is expressly subjected by the Code, when she sues alone.

By the same section, she is obliged to prosecute by a next friend, only where her husband cannot be joined with her, meaning evidently where she claims a right in opposition to him.

I, therefore, conclude that the husband is properly joined with the wife as a co-plaintiff; that no next friend is necessary, and that any judgment which may be obtained in the action will be binding on her.

Motion denied, without costs.

Johnson agt. Kemp.

SUPREME COURT.

JOHNSON, President of Hanover Bank, agt. ALFRED F. KEMP.

Banks created under the general banking law, when suing, should recite the title of the act, and the date of its passage, under which proceedings were had for its incorporation. This is required by the 13th section of the 4th title of chapter 8, of the 3d part of the Revised Statutes, which is retained by § 471 of the Code.

New-York Special Term, February, 1855.

THE complaint states "that there is due from the defendant, to the said bank, the sum of \$864.28, which the plaintiff claims upon a promissory note, which it sets forth; and also states that the said bank is a banking association duly organized, whereof said Johnson is president; and that the plaintiff is holder and owner of the note; and that the same is past due and unpaid, and payable to the plaintiff.

The defendant demurs, because the complaint does not show or refer to the law under which the bank is doing business.

CHAS. TRACY, *for plaintiff.*

— WAIT, *for defendant.*

MITCHELL, Justice. The Code, § 471, (390) retains proceedings provided for by chapter 8 of the 3d part of the Revised Statutes, except the 2d and 12th titles. Section 13 of the 4th title of this chapter of the Revised Statutes provides, that in actions by or against any corporation, created by or under any law of this state, it shall not be necessary to recite the act of incorporation, *or the proceedings by which such corporation was created*, or to set forth the substance thereof; but that the same may be pleaded by reciting the title of such act and the date of its passage.

This section includes both corporations created by special

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law and those created under a general law—the last being referred to in the terms “created under any law of this state,” and “the proceedings by which such corporation was created;” the first, “*created by* (not under) any law,” and “the act of incorporation.” It applies, therefore, to banks under the general banking law; and such banks, when suing, should recite the title of the act, and the date of its passage, under which proceedings were had for its incorporation.

When an individual sues, his existence is assumed from the suit being in his name; but when a corporation sues, it must show how it was created, that the courts may judge whether it was created under authority of any law, and whether that law authorizes the contract, or cause, for which the suit is brought. Without this statement, there is a fatal omission of one of the material elements of a good cause of action.

This bank may, for aught that appears, be a foreign bank, without any right to sue in the name of its president, or even in the name of the bank; or, if it be an association doing banking business in the state, it may not be incorporated according to the laws of the state. By referring to the general banking law by its title and date, and alleging that the bank was duly incorporated under that act, this defect would be cured. The defect is not remedied by the provision in the Code, that in an action on an instrument for the payment of money only, it shall be sufficient to give a copy of the instrument, and to state that there is due thereon to the *party*, from the adverse party, a specified sum. (*Code*, § 162.) That applies only to such matters as constitute a cause of action when an individual is suing—not to those which are essential to show the legal existence of the party, and his capacity to sue.

The motion for judgment is denied, with \$10 costs.

SUPREME COURT.

AMAR HOFTAILING by PHILIP FINGER, her next friend, agt.
LUCIUS TEAL.

Before the Code, an infant plaintiff sued by a *next friend*, and an infant defendant appeared by *guardian*; but the Code now requires a *guardian* in both cases.

Although the change may be in name merely, it is irregular for an infant plaintiff to sue by a *next friend* instead of a *guardian*.

Albany Special Term, March, 1855.

MOTION to set aside summons, &c.

The plaintiff, being an infant, presented a petition to one of the justices of the supreme court, praying for the appointment of a *next friend* to commence this action.

In pursuance of the prayer of the petition, an order was made appointing Philip H. Finger such *next friend*. The suit having been commenced, the defendant moved to set aside the summons and complaint, on the ground that an infant cannot sue by a *next friend*.

J. H. REYNOLDS, *for plaintiff*.

R. E. ANDREWS, *for defendant*.

HARRIS, Justice. Under the former practice, an infant *plaintiff* sued by a *next friend*, and the infant *defendant* appeared by a *guardian*. But the Code requires that an infant party, whether plaintiff or defendant, should appear by *guardian*. This change the plaintiff's attorney has, inadvertently, failed to notice. It is true, as was said upon the argument of the motion, that the difference is but in name. And yet the legislature has seen fit to declare, that the person by whom an infant plaintiff shall be permitted to sue, shall be a *guardian*. To commence an action in any other way is an irregularity. It is

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by no means certain that the *next friend* in this case would be liable as a *guardian*. I am inclined to think he would not. But, at any rate, the defendant was not bound to take the risk of such a question.

Though I do it with some reluctance, I am constrained to grant the motion, with costs.

SUPREME COURT.

JOHN WEEKS and others agt. ALFRED NOXON.

Service of a summons, with or without an order of arrest, on an *election day*, and all proceedings under it, are *void*. (See *Sess. Laws* 1842, p. 109.)

New-York Special Term, January, 1855.

H. D. TOWNSEND, *for plaintiffs.*

J. O. MOTT, *for defendant.*

CLERKE, Justice. With regard to the service of civil process on election day, until 1842 the words of the statute were, that "no civil process shall be served, &c., on either of the days during which such election shall be held;" but in 1842, (*Laws of 1842, p. 109,*) it was amended so as to read "*no declaration by which a suit shall be commenced, or any civil process, or proceeding in the nature of civil process, shall be served,*" &c.

The case of *Wheeler agt. Bartlett*, (1 *Ed. Ch. R.*) to which the counsel for the plaintiff refers, was decided many years before the amendment. In that case the vice-chancellor says, "that the section (as it then stood) has reference to process which causes duress." I doubt whether that section admitted of so limited an interpretation. In using so comprehensive a

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term as "process," it may be well supposed that the legislature wished to provide, not only against arrest, or duress, but against any molestation that might interfere with the elector in performing the high and sacred duty which the elective franchise imposes. However this may be, the amendment of 1842 sets the question at rest.

Commencing a suit by declaration caused no duress, and was equivalent to the present mode of commencing an action by summons, when there is no order of arrest.

The present case comes within the meaning of the amended section; and, as the summons was served on an elector, on a day when an election was held, the process, and all the proceedings under it, were void.

It is unnecessary to consider the other question.

Judgment and subsequent proceedings set aside, with \$10 costs of motion.

SUPREME COURT.

ERASTUS CORNING and others agt. THE MOHAWK VALLEY INSURANCE COMPANY.

The proper remedy to obtain the sequestration of the property and effects of a corporation, and the appointment of a receiver, is by the summary proceedings in equity, provided by the Revised Statutes. (2 R. S. 463.) That is, by *petition*, on judgment and return of execution unsatisfied. Although, no doubt, a new action under the Code, for that purpose, might be available.

Albany Special Term, March, 1855.

MOTION for a receiver, &c.

The plaintiffs, having recovered several judgments against the defendants, upon which executions had been issued and returned unsatisfied, brought this action to obtain a sequestration of the stock, property, things in action, and effects of the de-

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defendants, and to have a receiver of the same appointed. By an order, made at a former term of the court, the defendants were required to show cause why the relief demanded by the plaintiffs should not be granted.

Upon this motion it appeared that, before the commencement of this action, Samuel Belding, jr., had also recovered a judgment against the defendants, and that an execution issued upon such judgment had been returned unsatisfied, and that thereupon a petition had been presented to the court pursuant to the 36th section of the article of the Revised Statutes relating to proceedings against corporations in equity; and such proceedings were had thereon, that an order was made, on the 15th day of January, 1855, declaring a sequestration of the stock, property, things in action, and effects of the defendants, and directing a reference to appoint a receiver of the same; and that, on the 22d day of January, George Bell was appointed such receiver.

W. L. LEARNED, *for plaintiffs.*

D. P. COREY, *for defendants.*

HARRIS, Justice. It is not denied that, but for the provisions of the Code, the proceedings for the sequestration of the property and effects of the defendants, and the appointment of a receiver, would have been regular and effectual, to vest such property and effects in the receiver. But it is insisted that, since the adoption of the Code, such sequestration can only be had in an action prosecuted for that purpose. In this view I cannot concur. An action commenced for this purpose might, no doubt, be made effectual. A sequestration of the property of the corporation, and the appointment of a receiver, might be obtained in this way. (*See Morgan agt. The New-York and Albany Railroad Company*, 10 Paige, 290.)

But the 36th section of the statute relating to proceedings against corporations in equity, (2 R. S. 463,) authorizes the party who has obtained a judgment against a corporation to

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apply at once, upon the return of an execution unsatisfied, for a sequestration and the appointment of a receiver. No new process against the defendant in the judgment is to be issued. No new suit instituted. The application to the court is by petition, founded upon the proceedings in the action in which the judgment has been recovered. It is a summary remedy provided by statute, and, as such, is expressly saved by the 471st section of the Code, which declares that that act shall not affect "any special statutory remedy" which had not theretofore been obtained by action. Nor is there anything in the proceeding inconsistent with any provision of the Code. I think, therefore, that the statutory provisions under which the proceedings have been had to obtain a sequestration of the defendants' property and effects, and the appointment of a receiver of the same, are still in force. If so, the defendants' property and effects are already in the hands of a receiver, appointed for the benefit of the plaintiffs in this action, as well as the creditor by whom the appointment was procured.

This motion must, therefore, be denied; but I think it should be without costs.

SUPREME COURT:

MORRIS PHELAN agt. WILLIAM DOUGLASS and others.

The legal mode of computing *time* is, that whenever the whole day, and *every moment* of it, can be counted, then it should be; whenever, if counted, the party would, in fact, have but a *fractional part of it*, then it should not be counted.

For instance, the day of the *date* of a note—the day of the *service* of a pleading, &c., should be *excluded* in the computation of time, because they are *fractional*—the party bound to perform, should have the whole number of *full and entire days* given him for that purpose.

But, in cases similar in principle to the present, where the infancy of the plaintiff expired on the 12th Dec., 1841, and he was authorized to bring his suit on the 13th Dec., 1841, and the statute allowed him ten years after the termination of his infancy (2 R. S. 295, § 16) within which to sue, and he commenced his suit on the 13th Dec., 1851, *held*, that he was one day too late, because, in computing that ten years, the 13th day of December, 1841, must be taken in, as he had the *whole and entire part of that day* to sue in; and computing that as the first day, the ten years expired on, and at the expiration of, the 12th Dec., 1851.

New-York Special Term, July, 1855.

THIS was an action brought by the plaintiff under the statute (2 R. S. 295, § 16) to redeem, as heir at law, certain lands, to which the defendants held title through a mortgage foreclosure and sale, made July 2, 1823. The plaintiff's father was the mortgagor, and previous to the sale owned the premises in fee. The plaintiff was not made a party defendant to the bill of foreclosure. The remaining facts will sufficiently appear in the opinion of the court.

THOMAS, *for plaintiff.*

STRONG, *for defendants.*

COWLES, Justice. The plaintiff was born on the 14th Dec., 1820. By well-settled rules he was competent to bring suit, as being of full age, on the 13th of Dec., 1841. (1 Salk. 44;

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6 *Mod.* 557; 4 *Dana R.* 557; 1 *Black. Com.* 463; 2 *Kent's Com.* 233; 1 *Pow. on Dev.* 128-9; *M'Pherson on Inf.* 447.)

The mortgage in question was given on the 15th June, 1821, and became due on the 15th June, 1822. The mortgagor (plaintiff's father) died Oct. 13, 1822.

The decree for the foreclosure of the mortgage and sale of the premises was made the 7th June, 1823, and the sale took place, under which the mortgagee (Douglass) purchased. on the 2d July, 1823.

As Douglass was neither in possession of the premises nor claimed a right to the possession of them under his mortgage, until the decree of sale and his purchase under it, the right of action to redeem must be regarded as commencing from that date, so far as to fix a date from which the statute of limitations would begin to run. From the date of the purchase, and not before, Douglass claimed an exclusive right to the possession of the premises by title, adverse and hostile to the claim of redemption now set up. But at that date the plaintiff was an infant, and, by 2 *R. S.* 295, § 16, was allowed ten years after the termination of his infancy within which to sue. As he was capable of suing on the 13th of Dec., 1841, that section of the Revised Statutes extended his time to sue until the year 1851. He brought this suit on the 13th day of December, 1851, and the first question presented is, whether he was in time, or was barred by the statute of limitations.

The plaintiff claims that the suit was properly brought on the 13th, while the defendant claims that the right of action expired with the expiration of the 12th day of December, 1851.

It has become a well-established rule in this state, that whenever an act is to be done in a certain number of days, months, or years, from the happening of any event, or the doing of any act, that, in the computation of time, the day on which the event happened, or the act was done, is to be excluded. Thus, a note due thirty days after date is payable on the 30th day, excluding from the count the day on which the note was dated.

In *ex parte Dean*, (2 *Cow.* 605,) the facts showed a judgment docketed on the 12th Sept. The statute was, that the bond,

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on appeal, might be given "at the time of rendering judgment, or *within four days thereafter.*" Held, that a bond given on the 16th was in time.

In *Homer* agt. *Liswell*, (6 Cow. 660,) an execution was issued 7th March. The statute required it to be returned by the officer "in thirty days from the date." Held, that he had *the whole of the 6th April* in which to make return.

In *Cornell* agt. *Moulton*, (3 Denio, 12,) note was dated 14th day of the month, and suit brought on the 14th day of the corresponding month six years thereafter. Held, in time; and the day of the date was to be excluded in the computation.

In *Snyder* agt. *Warren*, (2 Cow. 520,) land was sold on execution on the 15th August, 1822. On the 15th Nov., 1823, a judgment creditor offered to redeem. Held, to be within fifteen months after the sale, and so in time.

Such, too, has been the well-settled rule under our statutes in respect to time of pleading, putting in appearance, complying with orders of the court, and all other cases where any act is required to be done in a certain number of days after the service of a former pleading, notice or order; the day of the service is excluded in the computation of time. (*See also Commercial Bank of Oswego* agt. *Ives*, 2 Hill, 355.)

The reason of this rule is very obvious:—the law takes no notice of fractions of a day, except in certain cases where the hour itself becomes material—as the precise time when two judgments were docketed. Time is not, therefore, computed from the hour of the day on which the event happened, to the corresponding hour of the day of performance; but the computation is *from* the day when the act was done, such day being regarded as a *point of time*. The computation begins with the *expiration* of such day. It is thus computed literally *from* such day, that is, from its *close*, its ending, its expiration.

It will be observed that the day so excluded in all these cases has been partially spent—it is, in part, actually gone when the event happens—and for that reason is also excluded, since, if counted, it would fail to give the party to be affected the

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whole of that day, but only a fractional part of it, and yet count it as a whole day.

The law will not take notice of fractions of a day, and the fraction is excluded. But the reason of the rule ceases whenever the party affected has a whole and entire day, as one of those to be included in the computation.

This principle is recognized by Mr. Justice NELSON in *The People agt. The Sheriff of Broome*. In that case the premises were sold on the 18th day of July, 1835. On the 19th of October, 1836, a judgment creditor claimed to redeem. The year was held to expire on the 18th day of July, 1836, and the statute required the judgment creditor to redeem "within three months *after the expiration* of such year." Mr. Chief Justice NELSON says, "If we count the *nineteenth* day of July, 1835 as we should do, the *three months*, commencing the *beginning* of that day, will expire on the *eighteenth* day of October following. Here there can be no fraction of the *nineteenth* day of July to be disregarded, as the whole of it necessarily comes within the three months by the statute, commencing on the *expiration* of the year, which is the *last moment of the eighteenth day of July*."

The rule laid down in the last case is entirely consistent with that laid down in the other cases above cited. Indeed, it is the only one which can be consistent, and make the rule uniform in its operation. Whenever the whole day, and *every moment* of it, can be counted, then it should be; whenever, if counted, the party would, in fact, have but a *fractional part of it*, then it should not be counted.

By counting it in the first class of cases, the party has the full and entire number of days, months, or years, intended to be given. In the other he gets the fractional parts of the less than his full time.

The law governing the case (2 R. S. 295, § 12,) provides that, "If any person entitled to commence any action in the article specified,"—(and this is one of them,)—"shall be under the age of the time, &c., within the age of twenty-one years,"—(the first case here,)—"the time during which such disability shall continue"

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shall not be deemed any portion of the time limited for the commencement of such suit;" but such person may bring such action "after the said time so limited, and within ten years *after such disability removed, but not after that period.*"

Here, as we have seen, the party could have sued on the 13th day of December, 1841. His *disability* to sue ended with the expiration, with *the last moment of the 12th day of December, 1841.* With the last moment of that day his *disability was removed*, and he could sue during the whole of the 13th, and *each moment of that day.* He had ten whole years after such "*disability removed*" to bring his suit. We must, in computing that ten years, take in the 13th day of December, 1841, because he had the whole and *entire part of that day* to sue in,—not a fractional part, but each and every moment of it,—computing that as the first day of the ten years, and that period expired with the expiration of the 12th day of December, 1851. He did not sue until the 13th of that month, and then his whole ten years had expired, and the statute barred his claim.

As this view of the case is conclusive, it is unnecessary that I should examine the other questions raised by the defendants.

The plaintiff has brought his suit one day too late, and the complaint must be dismissed, with costs.

SUPREME COURT.

JARED G. BACON agt. ALLEN COMSTOCK and others.

It seems, that an allegation in a complaint, that the defendants severally endorsed said note; when it appeared, in fact, that the endorsement was jointly—in the firm-name of the defendants, would be amendable at the circuit.

In an action upon a joint liability against two defendants where one makes default, and the other interposes a defence, it is irregular for the plaintiff to enter judgment against the defendant who makes default, before the issues are disposed of as to the other, without leave of the court.

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The 245th section of the Code defines a judgment to be a final determination of the rights of the parties; and there can be but one judgment upon a joint liability; unless the court, as it is authorized to do, should think proper to render judgment against one or more of the defendants, and allow the action still to proceed against the others.

Albany Special Term, April, 1855.

MOTION to set aside judgment.

The complaint states that, on the 15th of May, 1845, the defendant, Allen Comstock, made his promissory note for one thousand dollars, payable three months after date, to the order of the defendant, Peter Comstock, and that he, and the defendants, Lorenzo D. Baker and John C. Cameron, afterwards *severally* endorsed the note, and the same was transferred to the plaintiff. The action was commenced in 1851: James H. Hooker was then plaintiff. Hooker having assigned the cause of action to George Gould and Elias Pattison, an order was made, in February, 1854, substituting them as plaintiffs, in the place of Hooker. Gould and Pattison having assigned the demand to Jared G. Bacon, an order was made, in September, 1854, substituting him as plaintiff in the action.

The note in suit was, in fact, endorsed by Peter Comstock, as first endorser, and the firm-name of Baker & Cameron, as second endorsers. The two Comstocks and Cameron appeared and answered. Baker made default.

On the 3d of March, 1854, the plaintiff's attorneys entered judgment against Baker for the amount of the note with interest and costs. The attorney who conducted the proceedings states, that he supposed that judgment might thus be entered against Baker upon his default, without affecting the right of the plaintiff to proceed to the trial of the action against Cameron, and to have judgment against him also.

After the judgment had been perfected against Baker, the defendant Cameron, upon leave obtained for that purpose, put in a supplemental answer, stating the recovery of the judgment against Baker, and insisting that it is a bar to any recovery against him.

On the 4th of March, 1854, execution was issued to the

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sheriff of Rensselaer upon the judgment against Baker, which was subsequently returned unsatisfied. In June following, proceedings supplementary to execution were instituted before the county judge of Rensselaer, and an order made for the appointment of a receiver of the property of Baker.

The defendant Baker, upon notice to the attorneys for the plaintiff and the attorneys for the defendant Cameron, moved to set aside the judgment; and the plaintiff, upon notice to the attorneys for the defendant Baker, and also the attorneys for the defendant Cameron, made the like motion.

J. PIERSON, *for plaintiff.*

S. STOVER, *for defendant Baker.*

G. VAN ZANTVOORD, *for defendant Cameron.*

HARRIS, Justice. The fact is undisputed, that the endorsement upon which the plaintiff relies to recover against the defendants, Baker and Cameron, is a joint endorsement in the firm-name. The defence upon which Cameron relies, in his answer, is, that the name of the firm was used by Baker, without his knowledge or authority, for the accommodation of the maker of the note. The allegation, therefore, that the note was endorsed by Baker and Cameron *severally*, is admitted to be untrue. But it is a variance which could not well mislead the defendants, and an amendment of the complaint in this respect would probably be allowed at the circuit.

Regarding the endorsement as a joint liability of Baker and Cameron, the judgment against Baker was irregularly entered. The common-law rule is, that the judgment must dispose of the rights of all the parties. There could not be two final judgments in the same action. If the action was against two, and, as in the case before us, one of the defendants made default, while the other interposed a defence, the plaintiff was required to omit entering judgment against the former, until the issue with the latter had been determined. So rigidly was this rule insisted on, that it needed the interposition of the legislature, to authorize a plaintiff to have judgment against one joint debtor

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who had been served with process, without first having proceeded to *outlawry* against his co-debtor who had not been served. (*Graham's Pr.* 192.) And even yet it is required that the judgment, in such cases, should be, in form, against all the defendants. (*Pardee* agt. *Haynes*, 10 *Wend.* 630; *Leggett* agt. *Boyd*, 6 *Wend.* 500; *Nelson* agt. *Bostwick*, 5 *Hill*, 37; 2 *R. S.* 877; *Code*, § 136.)

It is only where several actions are united in one, as in the case of a maker and endorser of a promissory note, that the legislature has gone so far as to authorize judgment to be perfected against one defendant, without including all in the same record. (*Sess. Laws*, 1835, *p.* 248.)

The 274th section of the Code authorizes a judgment for one of several plaintiffs and against another, and for one defendant and against another. In this respect the common-law practice is changed, for that required that the judgment should be for or against all the plaintiffs and all the defendants. But, even in such a case, the judgment being, as defined by the 245th section, a final determination of the rights of the parties, there could be but one judgment, unless the court, as it is authorized to do, should think it proper to render judgment against one or more of the defendants, and allow the action still to proceed against the others. Before a plaintiff can do this, he must obtain the order of the court. The plaintiff in this case has obtained no such order. He has perfected judgment against Baker, and still proposes to go on with the action against Cameron, who, as he alleges, is jointly liable with Baker, and that, too, without leave of the court. Nor is there anything in the circumstances of the case to render it a proper case for granting such leave. The plaintiff should have waited until the issue with Cameron had been disposed of, and then, if successful in that, he might have entered judgment against both Baker and Cameron; or, if unsuccessful, the judgment might, under the authority of the provision of the Code already referred to, have been entered in favor of the plaintiff against Baker, and in favor of Cameron against the plaintiff.

But it does not lie with the plaintiff to take the objection that

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his own proceedings have been irregular. It is rather late, too, for the defendant Baker to seek to avoid the judgment against himself. It is, indeed, a singular feature in the case, that both the plaintiff and Baker should be moving, at the same time, for the same relief. The coincidence may probably be accounted for by referring to the fact, that the papers upon which both motions are founded are in the same hand-writing. Baker, it appears, is insolvent. He is also a non-resident. He, or rather his attorney, has, undoubtedly, thought fit to lend his aid to remove the obstacle which this judgment presented to a recovery against Cameron.

Though, in form, two motions, yet it is really an application by the plaintiff to be relieved from the effect of his own judgment. No injustice can be done by granting this relief, but it must be as a matter of favor, and not of right. The judgment was undoubtedly entered under a misapprehension as to its effect. There was probably no intention, on the part of the plaintiff, to abandon his right of action against the defendant Cameron. To allow the judgment against Baker alone to stand, might have this effect. The counsel for Cameron seems to understand that it would.

I think the judgment should be set aside, but it should be on payment of the costs of opposing the motion.

SUPREME COURT.

EBEN J. YOUNG agt. GEORGE W. EDWARDS and others.

The remedy to compel an election of inconsistent causes of action is by motion, not by demurrer.

Alternative equitable relief may be alleged and obtained now as heretofore.

For instance—a complaint for the restitution of property, as a substantive ground of relief, may allege, 1st, That it was mortgaged under a usurious contract, and, 2d, That the sale under a foreclosure of the mortgage was void for other reasons.

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New-York Special Term, January, 1855.

THE facts in the case will sufficiently appear in the opinion of the court.

— ——— *for motion.*

— ——— *opposed.*

CLERKE, Justice. The proper way to compel a party to elect as to which of several inconsistent causes of action he shall abide by, is by motion. It is not necessary for the defendant to demur.

The object of this suit appears to be to procure, by the judgment of the court, the restitution of the property mentioned in the complaint. To show his right to this relief, the plaintiff states, 1st, That it was mortgaged by him to the defendants on a contract tainted with usury, and, 2d, That the sale under the foreclosure of the mortgage was void for other reasons; so that, if he could not sustain his first charge, he may be able to avail himself of the second, in order that he may be entitled, at all events, to the main relief which he seeks—the restitution of the property.

There is, certainly, nothing *inconsistent* in the statement of facts. The mortgage might have been usurious, and the sale itself might, on other additional grounds, have been oppressive, fraudulent, or otherwise contrary to equity, and calling for that interposition which the court never fails to afford under such circumstances.

Undoubtedly, a complaint cannot demand inconsistent relief—different kinds of redress, in themselves incongruous, or incompatible with the principles upon which courts of equity have always acted; as, for instance, the relief sought for in *Linden agt. Hepburn*, (3 Sand. S. C. R. 668,) where the plaintiff asked for a forfeiture of a term under a lease, and at the same time an injunction against the lessor, to prevent a breach of his covenant as to the particular use to be made of the tenement. In the language of Judge SANDFORD, "Equity abhors forfeitures; and

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you cannot ask her for one of her most benign remedies, while in the same breath you demand a rigorous forfeiture of your opponent's estate in the subject of the controversy."

But, alternative relief can be obtained; and it has been always common, in courts of equity, for the draftsman to frame his bill with a double aspect, when he doubted the particular relief to which he considered the plaintiff entitled; so that, if the court should be against him under one view of the case, it may, nevertheless, afford him assistance in another.

The relief sought for in the present case is of this description, although not expressed in as distinct a manner as may be desired. The whole complaint, indeed, may be the better for some revision; but, as I think, in its present shape, there can be no misapprehension on the part of the court or the adverse party, it is scarcely worth while to compel the plaintiff to amend.

Motion to compel the plaintiff to elect, &c., denied.

SUPREME COURT.

SMITH agt. HART.

No *appeal* can be taken from an order made by a county judge in proceedings supplementary to execution in a *cause originating in a justice's or county court*.

None of the provisions of the Code are applicable to such cases. It is only in actions in the *supreme court*, where such proceedings are had before the county judge, that an appeal is authorized.

Fourth District, General Term, July, 1855.

ALLEN, BOCKES, and JAMES, Justices.

MOTION to dismiss an appeal.

The case presents the following facts:—Smith obtained a judgment against Hart before a justice of the peace, filed a

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transcript thereof in Fulton county clerk's office, and docketed judgment thereon on the 24th of March, 1855. An execution was issued thereon to the sheriff of Fulton county on the same day. Proceedings were then taken before the county judge, under § 292 of the Code, and on the 26th March he made an order, which, after reciting that Hart had been brought before him, and witnesses examined, and that it appeared Hart had money, which he unjustly refused to apply towards the satisfaction of the judgment, and that there was danger of his leaving the state,

Ordered, the said money to be applied towards the satisfaction of the judgment; and that Hart pay Smith \$10 costs of the proceedings. Hart adjusted the matter, and paid Smith \$35 in full satisfaction of the judgment and costs of the proceedings, and removed from the state. An appeal was then brought from the order of the county judge.

— DUDLEY, *for motion*.

D. M'MARTIN, *opposed*.

By the court—BOCKES, Justice. It is obvious, that the appeal in this case is not authorized by chapter 3 of the Code of Procedure, entitled, "Appeals to the Supreme Court from an Inferior Court." That chapter provides only for appeals "from the judgment rendered by a county court, or by the mayor's court, or the recorder's court of cities." (*See Code*, §§ 344, 345, 346, 347.)

This is an appeal from an order, not from a judgment, within the meaning of § 344. In granting the order appealed from, the county judge acted as an officer, not as a court. His authority to act as an officer, as distinguished from proceedings in court, is clearly recognized by law. (*See Judiciary Act*, 1847, § 29, *ch.* 280; *also chap.* 470, § 27, *Sess. Laws of 1847*; *Code*, §§ 29, 30, 31.)

The appeal in this case must be upheld—if, indeed, it can be—under § 349 or 403 of the Code.

Can any appeal, under § 349, be taken to this court from an

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order made by a county judge, pursuant to § 292, in a cause in the county court?

Section 349 provides, that an appeal may be taken from an order made by a county judge "in any stage of the action, including proceedings supplementary to the execution," in the five cases therein specified.

The right to appeal in this case, as it regards this action, depends on the construction to be given to the language above quoted. If *the action* alluded to in this section contemplate an action in the supreme court only, then the appeal, being from an order in a case in the county court, is unauthorized under § 349.

Section 348 provides for appeals from *judgments* in actions in the supreme court, entered upon the report of a referee, or upon the direction of a single judge of the same court. Of course, this section contemplates appeals in actions in the supreme court only.

Appeals from judgments being thus provided for, § 349 was introduced to secure relief against improvident and erroneous orders *in every stage of the action*. If this language shall be deemed to apply to actions in the county court, then appeals are to be allowed from every interlocutory order in the progress of such cause, falling within either of the five cases specified by § 349, and this, too, before final judgment in the county court. Such a construction would require the supreme court to control the practice and proceedings in actions in the county court, the same in all respects as if in its own court. But it is obvious that § 349 follows up the subject considered, and partly covered by § 348. That section having provided for appeal from judgments, the next provides for appeals from orders; the first by its language being confined to actions in the supreme court, and the second pointing directly to the same class of cases. *The action*, therefore, alluded to in § 349 contemplate an action in the supreme court only.

Nor does the section receive any additional scope from the words, "including proceedings supplementary to the execution," as it regards the question under consideration. Lest the

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words, "in any stage of the action," should be deemed insufficient to embrace orders after judgment, which is sometimes regarded as determining the action, the phrase "including proceedings supplementary to execution" were added.

I am brought to the conclusion, therefore, that this appeal, being from an order in a proceeding in an action in the county court, is not authorized by § 349 of the Code.

Does the last paragraph of § 403 give the right to appeal in a case like this under consideration?

That section, too, must be deemed to have reference to actions in the supreme court only. Clearly, the first clause is confined to such actions, and the last clause is necessarily limited in like manner, because it points directly to those orders which it would be appropriate for a judge of the supreme court to grant; and a judge of the supreme court has no jurisdiction to allow orders in actions or proceedings in the county court. The remark at the close of the opinion in *Conway agt. Hutchins*, (9 Barb. 378, 387,) was not called for, and was evidently made without reflection. The appeal was unauthorized by § 403.

There is another good reason why the appeal should be dismissed. The papers show conclusively, that the subject matter of the appeal has been settled by the parties. After the order was granted by the county judge, the parties compromised, and Hart paid, and Smith received, \$35 in full satisfaction of the claim and costs. The money was not paid upon the order by coercion, but by compromise.

The appeal is therefore a mere formality, without substance, and should not occupy the attention of the court or incumber its records.

The motion to dismiss the appeal must be granted.

SUPREME COURT.

HOGE & ROBB agt. PAGE and others.

A *sheriff*, under an *attachment*, is not entitled to *poundage* in any case, except when the property attached is *actually sold*.

But after the *levy* upon an attachment (for which he is entitled to fifty cents) he is entitled to a "compensation for his trouble and expenses, in taking possession of and preserving the property," whether sold or not; which compensation must be fixed by the officer issuing the attachment.

New-York Special Term, July, 1855.

THE plaintiffs' claim in this case was \$45,000.

An attachment under the Code, against the defendants, as non-resident debtors, was issued, and stocks to the amount of \$8,000 levied on by the sheriff. The plaintiffs then compromised their claim for \$22,500, upon which the suit was settled. The sheriff's bill for services and fees under the attachment is presented for adjustment. He claims to be allowed poundage upon the \$22,500. The plaintiffs claim that he shall charge poundage only on the \$8,000. This is the only question raised or presented for adjudication here.

— — — — — *for sheriff.*

— — — — — *opposed.*

COWLES, Justice. By the Code, § 243, it is provided, that the sheriff shall receive the "same fees and compensation for services, and the same disbursements under this title (*title VII.*) as are allowed by law for like services and disbursements under the provisions of chapter 5, title 1, part 2, of the Revised Statutes."

The class of cases treated of in chapter 7 of the Code, are,

1. Arrest and bail.
2. Claim and delivery of personal property.

3. Injunction.
4. Attachment
5. Provisional remedies.

The sheriff, under this attachment against these non-resident debtors, is entitled to receive the same fees, &c, he would for *like* services under chapter 5, title 1, part 2, of the Revised Statutes.

The services in that part of the Revised Statutes which are *like* those performed by the sheriff in this case, will be found at 2 R. S. 3, §§ 1-12, and relate to attachments against absent, concealed, and non-resident debtors.

The compensation of the sheriff for his services under those provisions of the Revised Statutes is provided for at 2 R. S. 646; which provision is in these words:—

“For serving an attachment against the property of a debtor under the provisions of chapter 5 of the 2d part, or against a ship or vessel, under the provisions of the 8th title of chapter 8 of part 3d, fifty cents, with such additional compensation for his trouble and expenses in taking possession of and preserving the property attached, as the officer issuing the warrant shall certify to be reasonable. And when the property so attached shall afterwards be sold by the sheriff, he shall be entitled to the same poundage in the sum collected as if the sale had been made under an execution.”

There is nothing in the laws of 1850, (p. 404,) amending the Revised Statutes, which affects in any respect the question as to the poundage here charged.

A slight examination of the several sections above cited will show that the sheriff cannot, under an attachment, charge poundage in any case, except when the property attached is actually sold. After levying under his attachment, he is to receive fifty cents, and “such additional compensation for his trouble and expenses in taking possession of, and preserving the property, as the officer issuing the warrant shall certify to be reasonable.”

This being done, he receives nothing further unless the “property so attached shall afterwards be sold by him,” in

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which case he is entitled to receive the same poundage as on moneys collected on execution.

The proper course, therefore, for the sheriff to pursue, after making his levy under an attachment, is to apply to the officer issuing it to fix the amount of compensation, for his trouble and expenses in taking possession of, and preserving the property attached. That compensation the sheriff is entitled to receive as soon as it is fixed, whether the plaintiff proceeds further in the suit or not, and without waiting the determination of the action. If, after this, the property shall still be sold, the sheriff is then entitled, over and beyond what the officer issuing the warrant has allowed him, to receive his poundage on the amount collected by such sale.

In this case, there having been no sale, the sheriff is not entitled to poundage. He must apply to the officer who issued the warrant, to fix the amount he is entitled to receive.

An order will be made to that effect.

SUPREME COURT.

JOHN ALDEN agt. ANSON CLARK, HENRY TIFFT, and GEORGE
BRADLEY.

On a judgment against *principal* and *surety*, the surety may pay the plaintiff the amount of the judgment, and take an assignment of it to himself, and enforce it against the principal. Such payment, being now construed as made in *equity*, does not satisfy or extinguish the judgment as to the principal.

The writ of *scire facias*, both as a public and private remedy, is entirely abolished by the Code.

In no case, whether more than five years have elapsed or not, since the rendition of the judgment, should *execution* be permitted to issue, against the property of a deceased judgment debtor, under the act of 1850, chapter 295, without leave of the court, upon due notice.

Such application should be upon affidavit, setting forth all the facts, together

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with the surrogate's permission. An order should be made for all persons interested in the estate to show cause, at a special term, why execution should not issue; and also directing how, and on whom, such order should be served. (*Code*, § 284.)

Sandy Hill General Term, January, 1855.

HAND, CADY, ALLEN and JAMES, Justices.

APPEAL from an order of the Washington county special term, on a motion for leave to issue execution against the estate of a deceased judgment debtor.

The plaintiff, Alden, in 1847, obtained a judgment in the supreme court against all the above-named defendants, upon a note made by Clark, and signed by the others as sureties for his benefit. (After judgment and execution, Tift and Bradley paid plaintiff the amount of the judgment, and took an assignment to Bradley.) After the judgment, and about seven years since, Clark died, leaving real estate. Bradley (the assignee) now moves, on the original judgment, for leave to issue execution against Clark, under the act of 1850, (chapter 295,) that he may enforce the same against his real estate.

The motion papers show that no letters of administration or testamentary had been issued upon Clark's estate, nor had any permission been granted for an execution to issue by the surrogate. Notice of this motion was also served without any order or direction from the court.

A. D. WAIT, *for motion.*

HUGHS & NORTHRUP, *opposed.*

By the court—JAMES, Justice. In the consideration of this motion several important questions arise.

The first is, whether the judgment upon which this motion is founded was not satisfied and extinguished by payment of its amount to the plaintiff, and his assignment and transfer thereof to one of the defendants.

Formerly, the payment of a judgment to the plaintiff, by one of several co-defendants, operated, at law, to satisfy and extinguish such judgment; and an assignment of the same to one of several co-defendants produced the same result. In equity,

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however, the rule was different, and that rule has been adopted by our supreme court, under its present organization and union of law and equity powers. This rule was applied by the court of this district in *Corey agt. White*, (8 Barb. Rep. 12,) in a case where judgment had been rendered against maker and endorser under the act of 1832—the endorser having purchased the judgment, and taken an assignment of it in his own name. Also in the third district, in the case of *Goodyear agt. Watson*, (14 Barb. 481.) It was there held that a surety, paying a judgment rendered against himself and principal, and taking an assignment to himself, did not satisfy or extinguish the judgment as against the principal. This doctrine proceeds upon the principle that the relation of principal and surety exists, and continues after judgment; and that payment by the surety entitles him to be subrogated to all the rights and remedies possessed by the creditor against the principal debtor.

In this case there is no dispute about the facts. It is conceded that Clark was the principal debtor, and Tift and Bradley but sureties; and it is not claimed that Clark has ever paid or satisfied any part of the debt. The sureties have satisfied the plaintiff, and taken an assignment of the judgment to themselves. If it is permitted to stand, they may be able to indemnify themselves; if not, they may be remediless. To hold it valid, would protect right, promote justice, and prevent circuity of action, and wrong no one. The case cannot be distinguished, in principle, from those of *Corey agt. White*, and *Goodyear agt. Watson*. For these reasons, I think the equity rule should prevail, and the judgment held valid and subsisting against the estate of Clark, capable of being enforced in the hands of the sureties, the same as if owned by the original plaintiff.

The next question presented for consideration, is the right to issue the execution asked for upon motion.

Before the Code, in case of the death of a debtor, after final judgment, the mode of proceeding was by *scire facias*. Has that remedy been abolished? Section 428 of the Code so declares, and provides that the remedies heretofore obtainable in

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that form may be obtained by civil action under the provisions of that chapter. It is however insisted, that § 428 only abolishes the writ as a public remedy; and the language of the section, the reference to the other provisions of the chapter, and the character of those provisions, go far to sustain that view. But Justice MARVIN, in *Cameron agt. Young*, (6 How. 372,) held, that as a *scire facias* was an action, it was abolished by § 69 of the Code, in which decision I fully concur. That a *scire facias* was an action, is sustained by *Co. Lit.* 290, b, 291; *Wils. Rep.* 251; 1 *Tenn. Rep.* 267; and 2 *Tenn. Rep.* 46. It could be pleaded to the same as another action; and a release of all actions was held a bar to the writ.

It was properly an action of record. It was either of a private or a public nature. As a private remedy it was incidental to other actions—being founded upon matter of record in such actions. It lay, 1st, To have execution, or for some other purpose, as between the original parties. 2d. To have execution against bail, who had become liable for the debt of their principal. 3d. Upon judgment upon the introduction of new parties; either when a party dies after interlocutory judgment, for an assessment and judgment; or to have execution on final judgment when new parties were introduced, by death, marriage, or other event.

Since the Code, it has been several times held that the writ of *scire facias*, to obtain execution on a judgment when both parties are living, is entirely suspended by the Code; (*Catskill Bank agt. Sanford*, 4 How. 100, 101;) and there seems to be no doubt but §§ 283, 284 of the Code, were intended as a substitute for the writ of *scire facias* in such cases, where the right to issue execution had been lost by the lapse of time.

A *scire facias* to obtain execution when a defendant died after final judgment, and before execution, seems also to have been swept out of existence by § 69. Section 71 declares, that no action shall be brought upon a judgment of a court of record between the same parties without leave of the court; but, as appears by the codifiers' notes, chapter 2 of title 12, part 2, of the Code, § 376, &c., was enacted to give a remedy

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against joint debtors not served with process, and heirs, devisees, legatees, &c., of deceased judgment debtors, and at the same time prevent the abuse provided against by § 71. The proceedings provided by that chapter bear a strong similarity to the action of *scire facias* to obtain execution upon final judgment after the death of the judgment debtor, and was, no doubt, intended as a substitute therefor.

It may, therefore, be safely affirmed that the writ of *scire facias*, both as a public and private remedy, is entirely abolished by the Code. (§§ 69, 284, 376 to 381, 428.)

Chapter 2, title 12, § 376, provides for summoning the heirs, devisees, or legatees, of a deceased judgment debtor, or the tenants of real property owned by him, and affected by the judgment after the expiration of three years from the granting of letters, &c., on the estate; and for summoning the personal representatives at any time within one year after their appointment.

Under this section it is necessary that letters testamentary, or of administration, should issue before any steps could be taken by the judgment creditor. This chapter was a part of the original Code of 1848. In the revision of 1849, it was somewhat amended, and enacted as it now stands.

The legislature, it seems, was not satisfied with its provisions, and the next year, 1850, undertook to provide for the creditors of deceased judgment debtors, whose judgments were liens upon property, a more simple and expeditious mode of obtaining satisfaction of their judgments, and enacted the 295th chapter of the laws of 1850.

By that act the creditor is not required to wait until letters are granted against the deceased debtor's estate, as in § 376 of the Code; but one year after the death of the judgment debtor, upon permission granted by a surrogate having jurisdiction to grant administration, &c., on the estate, execution is permitted to issue in the same manner, and with the same effect, as if the judgment debtor were still living. So far as anything has come to my knowledge, this act is yet in full force and effect; and while it so remains, it is the duty of the courts to give

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those seeking to avail themselves of it, the full benefit of its provisions.

This act is very brief, and does not, in direct terms, provide for notice to any person or party. But as the plaintiff's remedy is to be reached by the process of the courts, and as the courts have at all times control of process issued therefrom, care should be taken that such process is not issued without proper notice to all those interested, that they may have an opportunity to show cause. In no case, whether more than five years have elapsed, or not, since the rendition of the judgment, should execution be permitted to issue under that act, without leave of the court. The fair inference, from the language of the act, is, that application to the court for leave was contemplated.

It says, execution may issue in like manner as if defendant were living; and although if living, and five years had not elapsed, no application to the court would be necessary; yet the death of the defendant, having suspended the plaintiff's right to have execution, without application to the court, this act, after the lapse of one year, puts the plaintiff in a position to ask the court to declare the suspension of that right at an end, and that execution may issue in like manner as if the defendant were living. That application should be upon affidavit setting forth all the facts, together with the surrogate's permission. On presenting such papers to the court, an order should be made for all persons interested in the estate to show cause, at a special term, why execution on such judgment should not issue, and also directing how, and on whom, such order should be served. (*Code*, § 284.)

In the case under consideration, application to the court was absolutely necessary, more than five years having elapsed since judgment; and application was accordingly made under § 284. But it is objected that the notice of the motion was not served in accordance with the terms of that section, and that it could not be, because the mode of service there prescribed is not adapted to such a case. Let us compare the act of 1850 with this section, and see if there is any such difficulty. The act says, "Execution may be issued, and executed in the same

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manner, and with the same effect, as if the judgment debtor were still living." Section 284 says, "Execution can be issued only by leave of the court, upon motion, with personal notice to the adverse party, unless he be absent, or non-resident, or cannot be found to make such service; in which case such service may be made by publication, or in such other manner as the court shall direct." That personal service in this case cannot be made is conceded; but as the act authorizes the execution to issue in the same manner as if the defendant were living, and if living, and personal service could not be made, the court is authorized to direct the mode of service. I can see no difficulty in the court's exercising the power thus given by that section, and directing how those interested shall be notified. The manner I have before suggested.

But in this case the notice was neither personal, by publication, nor under the direction of the court, and consequently entirely insufficient: neither was permission obtained from a surrogate having jurisdiction to grant letters, &c. I regard such permission in the nature of a condition precedent. For these two reasons the order of the special term must be affirmed.

It is objected against the act of 1850, that persons not parties to the record should not have these rights to real estate tried upon affidavit, unless by the plain direction of the legislature. I concede this, and in any case that may arise under the provisions of this act, and the Code, that difficulty can be obviated. If, upon any motion or application for execution, questions of fact arise, § 271, sub. 3, of the Code, makes ample provision for a trial of such fact before a referee, and when all parties can test the plaintiff's right as fully as by the former action of *scire facias*.

As this proceeding is new, and the practice entirely unsettled, the order is affirmed without costs.

HAND—*Dubitante*.

SUPREME COURT.

THE BANK OF LOWVILLE agt. ABRAM F. EDWARDS.

A *demurrer* which states "that the complaint does not state facts sufficient to constitute a cause of action," does not reach an objection that the complaint does not aver the incorporation of the associated bank, which brings the suit. That the plaintiff has not legal capacity to sue, is made a *special* cause of demurrer by § 144, *sub.* 2, of the Code. And besides, the capacity of a plaintiff to sue is independent of the cause of action.

An averment that the defendant endorsed the bill (of exchange) to A— B—, who endorsed it to C— D—, and that the latter endorsed it to the plaintiff, is sufficient to show *title* in the plaintiff. The averment of endorsement to the plaintiff legally imports a delivery—a vesting of the title in the plaintiff by transfer.

But if such an averment was a defect in the pleading, it could not be reached by *general demurrer*.

It is not necessary to aver that a bill of exchange was *accepted in writing*. Under the statute there can be no valid acceptance except in writing. A general averment of acceptance is, therefore, sufficient.

Lewis Special Term, June, 1855.

MOTION for judgment on frivolous demurrer to complaint.

D. M. BENNETT, *for plaintiff.*

JAMES W. NYE, *for defendant*

HUBBARD, Justice. The action is upon a bill of exchange, drawn by E. C. Hamilton & Co. upon Stanton & Wilcox, and made payable to the order of the defendant. The demurrer assigns two causes:—

(1.) That the complaint does not state facts sufficient to constitute a cause of action, and,

(2.) That the complaint does not state that the said Stanton & Wilcox accepted the bill of exchange in writing.

Under the first it is claimed that the complaint is insufficient in two respects:—

The Bank of Lowville agt. Edwards.

(1.) That it does not appear that the plaintiff is an incorporated bank, having capacity to sue, and,

(2.) That the complaint does not sufficiently aver title to the bill in the plaintiff.

There is no allegation in the complaint of the plaintiff's incorporation. Whether it is necessary to aver the incorporation of an associated bank when it sues as plaintiff, cannot here be raised, for the reason that the plaintiff's capacity to maintain the action is not in question under a general demurrer, that the complaint does not state facts sufficient to show a cause of action. That the plaintiff has not legal capacity to sue, is made a special cause of demurrer by the *2d sub.* of § 144 of the Code, and must therefore be specially assigned. The assignment of a cause of demurrer under one subdivision of the section, cannot be made to embrace another—each must be separately assigned. And besides, the capacity of a plaintiff to sue is independent of the cause of action; the facts showing the former are not facts constituting the cause of action, and for this reason the question cannot be raised upon demurrer under the *6th sub.* of § 144.

(2.) It was also claimed that the complaint does not show title to the bill of exchange in the plaintiff. The averment on the subject is, that the defendant endorsed the bill to Gillmore, Jewett & Co., who endorsed it to John J. Talcott, who endorsed it to Amos Spafford, and that the latter endorsed it to the plaintiff. There is no allegation that the bill was ever delivered to the plaintiff, or that it was the owner or holder thereof. I think the complaint sufficient. The averment of endorsement to the plaintiff legally imports a delivery, a vesting of the title in the plaintiff by transfer. This would have been good pleading under the old system, and certainly should be held good under the Code, which requires a liberal construction, with a view to the substantial rights of the parties. But it seems to me, that if the pleading is insufficient in this respect, that the defect cannot be reached by a general demurrer under *sub. 6* of § 144 of the Code.

If the pleader undertakes to aver a fact, but does it defect-

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ively, the defect should be pointed out, as a special cause of demurrer. *Sub.* 6 of the section applies to cases when a fact or facts essential to the cause of action are wholly omitted in the complaint, and not when they are imperfectly stated.

(§.) As to the second cause of demurrer assigned, the complaint simply alleges, that the drawers of the bill of exchange, Stanton & Wilcox, accepted it, without stating that their acceptance was in writing. It is not necessary to aver that the acceptance was in writing. Under the statute there can be no valid acceptance except in writing; and a general averment, therefore, that the bill was accepted, implies that the acceptance was in writing. As the drawee could not otherwise become an acceptor, or the bill be accepted.

The motion for judgment must be granted, and without leave to the defendant to answer, because no affidavit of merits is made.

SUPREME COURT

ALLEN agt. FOSGATE and FOSGATE.

A promissory note, and a *guarranty* of payment written upon it, are different instruments, and impose distinct and different obligations.

A joint action, therefore, against the maker and guarantor, cannot be maintained. The Code does not allow a joint action against several, unless they are liable upon the same obligation or instrument, in which case *all or any* of them may be included in the same action, at the option of the plaintiff.

St. Lawrence Special Term, June, 1855

THE action is against John Fosgate as maker, and against John Fosgate, junior, as guarantor, of a promissory note. The complaint contains but one count, wherein the note and guaranty are set out; and avers that the guaranty is endorsed on the note in these words:—

“For value received, I guarantee to John B. Eaton the payment of the within note when due. JOHN FOSGATE.”

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The defendants demurred to the complaint, and allege as grounds of demurrer, among others, that the defendants are not liable as joint debtors, and that several causes of action are improperly united.

W. H. ANDREWS, *for plaintiff.*

CHAS. ANTHONY, *for defendants.*

BOCKES, Justice. If any doubt remained in regard to the question presented by the demurrer in this case, after the decision in *De Ridder* agt. *Schermerhorn*, (10 Barb. 638,) it was dispelled by the court of appeals in *Brewster*, agt. *Silence*, (4 Selden, 207.) That was an action against the guarantor of a promissory note—the guaranty being written under the note as follows:—

“I hereby guarantee the payment of the above note.

“F. SILENCE.”

This was held to be a contract distinct from the note. The learned judge, delivering the opinion of the court, remarks, (page 215,) “The note and guarantee are not one and the same thing. The note is the debt of the maker. The guaranty is the engagement of the defendant that the maker shall pay the note when it becomes due. A joint action will not lie against them both. They are not the same, but different and distinct contracts.” Justice JEWETT has elaborated this point in *Durham* agt. *Manrow*, (2 Com. 533, 542, *et seq.*,) with great clearness. In that case, it is true, he stood with the minority of the court, and for a reversal of the judgment of the supreme court; yet his opinion seems to have been adopted in the subsequent case of *Hall* agt. *Farmer*, (2 Com. 555.)

Those cases which are in conflict with *De Ridder* agt. *Schermerhorn*, and *Brewster* agt. *Silence*, must be deemed to be overruled, and the law as there laid down permanently settled.

The act of 1832 gave the holder of a promissory note or bill of exchange, the right to unite the maker, indorser, drawer,

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and acceptor in one action. But this statute did not reach the case of a guarantor. under the decisions which hold that the contract of guaranty is distinct from the contract of the maker of a promissory note. The Code (§ 120) has still further extended the rights of parties holding bills of exchange and promissory notes. At common law, the holder could not maintain a joint action against all of several makers, who promised severally and not jointly; nor against two of three joint and several promisors.

The statute of 1832 did not affect the rule of the common law in these respects. The Code (§ 120) has changed this common law principle; but still does not permit a joint action against several, unless they are liable upon the same obligation or instrument, bill of exchange, or promissory note; in which case *all or any* of them may be included in the same action, at the option of the plaintiff.

It being decided that the guarantor's liability is not on the note, the Code does not reach his case. The learned judge in *De Ridder agt. Schermerhorn*, alludes to the change effected by the Code, and gives it the same effect above indicated.

The note and guaranty are different instruments, and impose distinct and different obligations.

Judgment for the defendants on the demurrer.

SUPREME COURT.

THE NEW-YORK & ERIE BANK, appellant, agt. ROBERT CODD,
respondent.

Counter affidavits may be read on a motion to vacate an attachment, made before the officer who granted it.

And the plaintiff may read *further or supplementary affidavits*, in answer to the motion, for the purpose of sustaining the attachment.

But the plaintiff should not be permitted to offer evidence to sustain his attachment, upon other and different grounds from those upon which he first predicated his right to it. (*All the reported cases upon these questions, since the Code, examined.*)

On *appeal* from the order of the justice at chambers, the court is not confined to the question whether the affidavits disclose facts sufficient to give the judge *jurisdiction* to issue the attachment, but may review the decision of the officer upon the *merits*. (BACON, J., *contra*, on this last point.)

Erie General Term, May, 1855.

Present, BOWEN, P. J., BACON and GREENE, JJ.

APPEAL from an order made at chambers on the following facts:—

On the 14th day of November, 1854, a motion was made before Justice GREENE, at chambers, for an attachment against the defendant, on the ground that he had departed from the state, with intent to defraud his creditors, or to avoid the service of a summons, or that he kept himself concealed within the state with the like intent.

In support of the motion, the plaintiff read two affidavits, upon which a warrant of attachment was issued, on that day. On the 21st day of November, a motion was made before the justice who issued the attachment to vacate the same. The motion was founded upon the affidavits upon which the attachment was issued, and upon new affidavits on the part of the defendant; and was opposed by new affidavits on the part of the plaintiff, tending to contradict the affidavits read in support of the motion, and to strengthen the case made for the attachment in the original affidavits. The new affidavits on both

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sides were read, subject to the objections of the respective parties; and the question as to the right of either party to read new affidavits was reserved, and argued with the other questions raised on the motion.

The justice decided that all the affidavits were admissible, and, upon a consideration of the case, as made by all the affidavits, granted the motion to discharge the attachment.

The plaintiff appealed to this court.

CHAUNCEY TUCKER, *for appellant.*

JOSEPH G. MASTEN and JAS. G. HOYT, *for respondent.*

By the court—GREENE, Justice. Three questions arise on this motion:—

1st. Did the affidavits upon which the warrant was first issued, contain facts sufficient to give the officer jurisdiction, and to authorize the issuing of the warrant?

2d. If those affidavits were sufficient for those purposes, has the defendant a right to disprove the facts alleged in them by counter affidavits? and,

3d. If the defendant may read counter affidavits on this motion, can the plaintiff read new affidavits, either for the purpose of fortifying the grounds on which the right to the attachment is predicated in the original affidavits by additional evidence, or of rebutting the facts set forth in the counter affidavits?

The first is a mixed question of law and fact, depending upon the tendency and force of the evidence disclosed by the original affidavits, which will be considered hereafter. Upon the last two questions there is some real, and more apparent conflict of authority.

The earliest case which has fallen under my observation, in which the question as to the practice of reading counter affidavits on a motion to vacate an attachment was raised, is that of *Killian agt. Washington*, decided Dec., 1849, (2 *Code Reporter*, 78.) The defendant in that case read affidavits, apparently without objection, to disprove the fact on which the attach-

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ment was issued, and the court ordered a reference, to determine the facts in controversy.

In the case of *Morgan agt. Avery*, decided in January, 1850, (7 B. S. C. R. 656,) an attachment had been issued upon an affidavit, alleging that the defendant had departed from the state with intent to defraud his creditors; and I infer from the opinion of Justice EDMONDS, at page 662, that there was also an allegation of an intent to avoid the service of a summons.

Two questions were raised on the motion at special term to dissolve the attachment: *first*, whether the defendant could be relieved on motion; and, *second*, whether the plaintiff could read supplementary affidavits for the purpose of strengthening the case made by his original affidavits.

Justice EDMONDS, at the special term, held that the attachment could not be treated as an order, and that, therefore, the remedy by appeal, given by § 849 of the Code, was not applicable, and that the defendant's only remedy was by motion.

Upon the other question, the learned justice *held*, that the supplementary affidavits might be read by the plaintiff, "not merely in answer to those on the part of the defendant, but in support of the original application for the attachment;" and added, "if such application was originally defective, that may influence the question of costs, but need not affect the great question, whether, by reason of defendant's absconding, the plaintiffs are entitled to the provisional remedy of an attachment."

In the case of *Conkling agt. Dutcher*, decided in July, 1850, by the general term in the 6th district, (5 How. Pr. R. 386,) an attachment had been issued by a county judge, which defendant moved, on affidavits at the special term, to vacate on the merits. The motion was denied by the special term, and the defendant appealed. The court, SHANKLAND, J., delivering the opinion, *held*, that the affidavits upon which the county judge acted were sufficient to confer jurisdiction upon him to act in the premises. That this order could be reviewed on the merits only on appeal to the general term, under § 349, and that the special term could entertain a motion to set it aside

only for irregularity. It was, therefore, held, that the order of the special term, denying the motion to vacate the attachment, *was not appealable*. The learned justice proceeds to say, "The defendant, against whom an attachment has issued, has two modes of getting rid of it, where it has been improvidently granted, first by applying to the judge to vacate his own order, (§ 324,) and, second, by appeal to the general term, under § 349, *sub.* 1. But in neither mode can opposing affidavits be read by the defendant, nor can additional affidavits be used by the plaintiff."

The case of *St. Arnaut* agt. *De Brizeedon*, decided in January, 1851, by the superior court of the city of New-York, (3 *Sand. S. C. R.* 708,) was an appeal from an order at chambers, denying a motion to discharge an attachment. The question was there raised as to the right of the plaintiff to introduce supplemental affidavits on such a motion, in support of the original affidavits on which the warrant was issued.

The court cited the case of *Morgan* agt. *Avery* with approbation, and decided that the affidavits were properly received.

The case of *Genin* agt. *Tompkins*, decided in Dec., 1851, by the general term, in the first district, (12 *Barb. S. C. R.* 265,) was an appeal to disprove the facts upon which the attachment was issued. There was no question made in the case as to the sufficiency of the affidavit upon which the warrant was allowed; and Justice HARRIS *held*, that counter affidavits could not be read on the motion. The cases of *Morgan* agt. *Avery*, and *Conklin* agt. *Dutcher*, were cited, and the former case was regarded as overruled by the latter.

In the case of the *Bank of Lansingburgh* agt. *M'Kie*, decided in December, 1852, (7 *How. Pr. R.* 360,) a motion was made, at special term, to vacate an attachment granted by a county judge. There appears to have been no question in that case as to the sufficiency of the affidavit upon which the warrant was issued, and the only question was whether, when an attachment had been issued on sufficient affidavits, a motion could be made, *at special term*, on new affidavits, to vacate the warrant, and Justice HARRIS again *held*, upon a review of the

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cases of *Morgan* agt. *Avery*, and *Conklin* agt. *Dutcher* that counter affidavits could not be read on that motion.

In the case of *Granger* agt. *Schwartz*, decided in the superior court of the city of New-York in October, 1853, an attachment had been issued against two defendants, as non-residents, upon an affidavit showing such non-residence, and that neither of the defendants had been served with the summons.

The plaintiff sought to sustain the attachment by affidavits, showing that the resident defendant had concealed himself, &c. The court *held*, first, that as the affidavit upon which the attachment was issued showed both defendants to be non-residents, and that neither of them had been served with the summons, the court had no jurisdiction of the action, and consequently that the judge had no jurisdiction to grant the warrant; and, second, that where an attachment has been issued upon papers which show upon their face that it is void, a motion to vacate it cannot be defeated by showing that other grounds for it exist, different from those shown in the original papers.

The last case is an express authority in favor of a motion at special term to set aside an attachment, or any other order that has been irregularly or illegally issued; or, in other words, an order issued upon affidavits which do not allege sufficient facts to give the officer granting it *jurisdiction to act in the matter*.

The same thing was decided in *Blake* agt. *Locy*, (6 How. 108,) and *Lindsay* agt. *Sherman*, (1 C. R. N. S. 25,) and is assumed by the learned justices who delivered the opinion in *Conklin* agt. *Dutcher* and the *Bank of Lansingburgh* agt. *M'Kie*. But it was *held* in the last two cases, and in *White* agt. *Featherstonhaugh*, that it was for *irregularity only*, that the order could be vacated on such a motion. And here, I apprehend, is the only point upon which the *authority* of the three cases last mentioned is in conflict with that of *Morgan* agt. *Avery*, and *Genin* agt. *Tompkins*, in which cases, as we have seen, motions to vacate the attachment on the merits were entertained at special term.

Justice SHANKLAND, in *Conklin* agt. *Dutcher*, and Justice HARRIS, in the *Bank of Lansingburgh* agt. *M'Kie*, agree in the
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proposition, that an attachment may be vacated on the ground that it has been improvidently issued, in two ways: *first*, by an application to the judge who issued it to vacate his own order; and, *second*, by an appeal from the order to the general term. The Code plainly provides for both of these remedies. (§§ 324 and 349.) But the question as to what papers might be used upon a direct application to vacate an attachment on the merits, to the judge who issued it, was not involved in either of those cases; nor in the case of *White agt. Featherstonhaugh*; and for this reason neither of those cases can be regarded as an authority on this point.

Justice HARRIS, in the *Bank of Lansingburgh agt. M'Kie*, in speaking of the practice in such cases, says, "The order having been made out of court, and without notice, the adverse party is at liberty to apply to the judge, who made the order, to vacate or modify it. This application may be founded upon the papers upon which the judge acted when he made the order, or upon new papers. The decision upon this application is final, except in such cases as are within the provisions of § 349. In those cases, of course, a review may be had by an appeal to the general term." The learned justice proceeds to say, that, "instead of applying to the judge who made the order, the party may move, at special term, to vacate the order; but that, on such motion, new papers cannot be read, for the reason that the inquiry on that motion is limited to the question, whether, upon the facts before the judge, he was authorized to make the order."

It is not necessary, on this motion, to settle this last question of practice, upon which the authorities above cited are in conflict. The question now is, can counter affidavits be read on a motion to vacate an attachment made before the officer who granted it?

I am of opinion, that the proposition that they can is sustainable, both upon principle and authority. We have seen that the general term of this court, in the first district, has twice decided that such affidavits may be read on motions to vacate attachments; that the practice of receiving such affidavits has

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received the deliberate sanction of all the justices of the superior court of the city of New-York, in two cases decided in that court, that the point now in controversy was not involved in either of the three cases where such affidavits were rejected, in all of which the question arose on motions made, in the first instance, or appeals from orders entered, at special term; and that this practice is conceded to be proper, on such a motion as this, by Justice HARRIS in the case of the *Bank of Lansingburgh* agt. *M'Kie*.

I think it must be so held upon principle. The attachment authorized by the Code is wholly unlike any remedy of that nature heretofore known to the law. It is an order in the action in the nature of process, and, like all orders of that kind, must, from the nature and necessity of the case, be subject to the inherent power which every court of general jurisdiction exercises by virtue of immemorial usage and prescriptive right over its process and orders, until that power is abrogated by express legislation. Sections 240 and 241 of the Code, provide for an application to the officer who has issued an attachment to discharge the same. Section 241 provides that it shall be discharged on the execution of an undertaking to pay the judgment that may be recovered.

This remedy is appropriate in a case where an attachment has been properly issued. But it affords no relief adapted to a case where an attachment has been improperly issued, and could never have been intended as a remedy in such cases. By the provisions of the first article of title 1 of chapter 5 of the 2d part of the Revised Statutes, entitled, "Of Attachments against Absconding, Concealed, and Non-resident Debtors," a party against whom an attachment has been issued, as an absconding, concealed, or non-resident debtor, may, at any time before the appointment of trustees, present a petition, verified by his oath, to the officer who issued the warrant, controverting the facts upon which it was issued, and praying that the allegations of the petition may be determined by the supreme court, &c., (2 R. S., p. 10, §§ 43, 44,) and thereupon, and on receiving from such debtor the security required by sec-

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tion 45, the officer is required to report his proceedings, with the affidavits, &c., to the court, (§ 46,) which court is required to proceed and hear the proofs and allegations of the parties in a summary way, and determine whether the allegations in the debtor's petition have been satisfactorily proved; (§ 47;) and in case such allegations shall be so proved, the court is required to discharge the attachment, and release the property of the debtor; (§ 48,) chapter 4 of title 7 of the 2d part of the Code, contains no such provision. But the absence of such a provision is by no means conclusive as to the power of the court to afford relief in cases arising under the latter statute.

The attachment provided for by the Revised Statutes was a mere statutory proceeding, instituted and conducted out of court, and before an officer who derived all his powers from the express provisions of the statutes. The attachment provided for by the Code is an order of the court, and can be issued only "in an action" pending in the court. The officer issuing it is the officer of the court, in his action in the premises he exercises the power of the court; and until it is judicially settled that the Code has developed a new and exclusive system of justice, and pragmatically declared a rule of right as anomalous as the course of procedure which bears that name, I cannot assent to the proposition that the court has no power to prevent an oppressive use of its orders, whether granted through the error or inadvertence of its officers, or procured by the false suggestions of a party.

I insist, therefore, that neither the absence of a provision authorizing the court to open its eyes, and exercise its senses upon a question so seriously affecting the rights of a suitor, as that involved in this motion at chambers, namely, whether the *ex parte* allegations on which the attachment was issued were true in fact, nor the existence of a provision like that for discharging the attachment on giving security for the payment of the judgment, a provision wholly inapplicable and inadequate to the exigencies of this case, justifies the presumption that the legislature did not intend that conflicting affidavits should be

received on a motion of this kind. But let the result of conjecture be what it may, the conclusion on this question must be the same. The necessity of entertaining this question on such evidence, exists in the nature of the proceeding; the power is inherent in the constitution of a judicial tribunal, it existed before the Code, and has not been abrogated by it. The court has no right to abdicate its powers because the legislature ignores them: they can be abolished only by clear affirmative provisions manifesting that intent. It is settled by the cases above cited, that when an attachment has been issued upon an affidavit which is not sufficient to give the officer jurisdiction, it may be vacated by the officer who granted it on an application to him; or it may be reversed for error on appeal to the general term, or set aside for irregularity on a motion at the special term.

It appears, from a review of the same cases, that the proposition that the motion, when made before the officer, may be founded upon affidavits controverting the grounds upon which the attachment was issued, is not opposed to the authority of any adjudged case; and I think it clear upon principle, that they may and should be received. I will add, though it is not necessary to the decision of this case, that I can perceive no objection to the practice of moving upon new affidavits at the special term. The judge who issues the attachment acts as an officer of the court, and his action is subject to the control of the court. But as the same remedy may be obtained in another form, this is not, perhaps, a point of any practical importance.

The next question made on the argument was, as to the right of the plaintiff to read further, or supplementary affidavits in answer to the motion, for the purpose of sustaining the attachment. Aside from the authority of *Morgan agt. Avery*, and the other cases above cited, it seems to me clear, upon principle, that this may be done.

The defendant makes a motion, upon affidavits, for a discharge of the attachment. And, in analogy to the practice on other motions, I think the plaintiff should have the privilege of answering the moving affidavits by any facts tending to contra-

dict the averments in such affidavits, and to sustain and fortify the grounds upon which the attachment was issued.

To this extent I can see no impropriety in receiving such affidavits. But the plaintiff should not be permitted to offer evidence to sustain his attachment upon other and different grounds from those upon which he first predicated his right to it.

It is suggested that the practice adopted in this case may operate as a surprise upon the defendant; and that, if it is sustained, the party moving for an attachment will disclose, in his first affidavit, barely facts enough to give the officer jurisdiction; and if he can obtain the attachment upon those facts, he will be permitted to sustain it afterwards by affidavits, which the defendant will have no opportunity to answer or explain. The remedy of the defendant, in such a case, is plain and effectual. He may, on an allegation of surprise, apply to the court or judge, who hears the motion, for an order that the motion stand over for a convenient time, to enable him to answer the plaintiff's new affidavits, and for permission to do so. This order will always be granted when it shall appear to be necessary to prevent surprise or injustice.

I am therefore of opinion, that the original affidavits upon which the attachment was issued, the counter affidavits on the part of the defendant, and supplementary affidavits on the part of the plaintiff, were all properly received on this motion; and that the appeal must be disposed of upon the case made by all of these papers.

My brother, BACON, is inclined to the opinion, that the decision of the justice at chambers, on the question of fact made by the affidavits, is conclusive; and that the only question that can arise here is, whether the affidavits disclose facts sufficient to give the judge jurisdiction to issue the attachment.

With great deference to the learned justice, I regard the office of an appeal of this nature in a very different light. It is brought, as I understand it, to review the decision of the officer on the merits.

The application for the attachment is addressed to the judg-

ment of the officer to whom the application is made. If he has no evidence before him sufficient to give him jurisdiction to entertain the question as to the existence of the fact upon which the party's right to the order depends, his order is void, and may be set aside for irregularity, and the party who acts under it will not be protected by it. When he merely misjudges as to the force of the evidence presented to him, his order, though valid, is nevertheless *erroneous*: and to correct that error by a review of the question upon the merits, is the precise office of an appeal. And, in my opinion, it is no answer to an allegation of error to say a judge has committed it. The mischief resulting from an error is in no degree mitigated by the fact that the error is judicial.

The question presented on this motion is a different one, in all its aspects, from one presented by an issue joined, by the pleadings in an action, and tried by a court or jury, according to the course of the common law, and different rules are applicable to it when brought up for review on appeal. In all such cases, where an appeal is given, I think all questions, both of law and fact, which affect the merits, are brought up for review.

The affidavits in this case are very voluminous; and I do not regard it as necessary to examine them in detail. Upon a careful review of all the facts disclosed, I am satisfied that the affidavits upon which the attachment was issued were entirely insufficient to warrant it. That if there was enough to give the justice jurisdiction, of which I have some doubt, it was nevertheless an improvident exercise of his powers to issue the warrant upon evidence so slight.

An examination of the subsequent affidavits has, in my opinion, strengthened the case made by the defendant on the motion. In this, as in many other cases of this kind, there may be some foundation for suspicion or doubt, as to whether all the proceedings of the defendant have been above reproach; but judicial action cannot be based upon suspicion.

The plaintiff, when he moved for this attachment, was bound to prove affirmatively some of the facts which gave him a title

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to this process. In this I think he failed; and in this opinion my brother BOWEN concurs.

The order must be affirmed.

BACON, Justice. I can add nothing to the full and elaborate opinion of Mr. Justice GREENE on the propriety of the practice, adopted in this case, of hearing, on the application to dissolve the attachment granted by him, the counter affidavits on the part of the defendant, and the supplemental affidavits on the part of the plaintiff. I concur in his conclusion, that all the affidavits were properly before him, and were all to be considered on the motion made at chambers, and are consequently rightfully before us on this appeal.

Having conceded this, however, which really is the only strictly legal proposition involved in the case, I am by no means certain that this does not dispose of the whole case; for it will then resolve itself into substantially a question of fact, depending upon the degree of weight to be attached to the whole evidence, as presented in all the affidavits, to wit, whether the defendant did depart from the state with intent to defraud his creditors. Upon this, as a question of fact, the justice, before whom the application to discharge the attachment was made, has held the proof not sufficient to establish the intent; and I am at a loss to discover by what authority we are entitled to review and revise his judgment in this matter. As an original question, the evidence might have affected our minds differently, and we might possibly have come to a different conclusion; but exercising, as we do in this case, a merely appellate jurisdiction, I know not why we should not be bound by the well-established rule, that, on a question of fact, passed upon by the tribunal whose decision is appealed from, the finding will not be disturbed by the appellate court. I do not see why this is not a proper case in which to apply that rule. I am disposed to consider it decisive in this case.

I have not, however, rested entirely in this conclusion, but have considered fully and carefully all the facts legitimately before us in the several affidavits of the respective parties; and

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from that examination I am led to concur in the propriety of the order discharging the attachment.

I cannot go over the case at any length, but can only indicate in a very general way my views. It is quite evident that the case is not brought within that part of § 229 of the Code, which authorizes an attachment against a person who "keeps himself concealed" to defraud creditors, or avoid service of process. No such concealment was attempted by the defendant in this case. He can only be brought within the action of the attachment, by having "departed from the state with intent to defraud his creditors," and that under circumstances which authorizes the party applying for to affirm, and the court which allows the attachment to presume, that he has "absconded," in the language of the 227th section.

The facts, disclosed in the original affidavits, were certainly not very strong, although it may be said they raised a presumption, on which the officer was authorized to act. But the counter affidavits on the part of the defendant, it seems to me, fully met, and satisfactorily disposed of, every circumstance from which the departure with the intent charged, was sought to be inferred.

What, then, did the supplemental affidavits on the part of the plaintiff prove, and how far are they to be admitted to sustain the attachment? I do not believe that a party is at liberty, in the first instance, to present affidavits which make out only the most bald and naked case, just sufficient to authorize the officer to entertain the application and grant the order, and then, when a full and perfect answer to all the facts and circumstances presented in the affidavits is made by the party proceeded against, to be allowed, by supplementary affidavits, not only to "bolster up" his case, but greatly to extend it, by attempting to show the fraudulent conduct of the defendant attending the creation of the debt, the mode in which he has dealt with others similarly circumstanced, and the strange and mysterious manner in which his assets seem to have vanished into thin air. The extent to which the cases have gone has been to authorize the introduction of supplementary affidavits, "*in support of the*

original application for the attachment." (*Morgan agt. Avery*, 7 Barb. 556, and *Pr. OAKLEY, J.*, 3 Sand. 708.)

With this limitation of the right to introduce additional affidavits in view, a considerable portion of the affidavits which were presented on behalf of the plaintiff in this case, should be rejected in the consideration of the only legitimate inquiry, did the defendant depart from the state, or, in other words, *abscond*, with intent to defraud his creditors? I can see much in the conduct of the defendant, as disclosed in these affidavits, that needs explanation; and which, unexplained, is entirely inconsistent with integrity or fair dealing; but I do not see the evidence, which the law requires, that he left the state under circumstances which subjected him to the action of an attachment as an absconding debtor.

Taking all the facts together, it is quite clear that he made no secret of his intention to leave home at the time, and for the object avowed by him; that he designed and attempted to return on the day he had designated as the time he should be home; and, in fact, returned, and was found at home, as usual, at the earliest practicable moment, and within twenty-four hours of the time he had originally appointed. It is true, he does not explain the business upon which he went; nor was this called for by the papers on which the application for the attachment was made.

The only allegation of fact in the original affidavits, aside from the circumstance that he was not to be found, upon the very limited inquiries made for him, and that stated on information and belief only, to wit, that the defendant had recently sent large sums of money to Canada, is met and explicitly denied in the opposing affidavit of the defendant.

The only question, then, is, did he convey his person from the jurisdiction of our courts with intent to defraud his creditors? If he did, his property is legally subject to attachment. If not, although the disposition of his property may be fraudulent, yet if he presents his person to be dealt with by his creditors as they may be advised, his property cannot be taken by this summary process, which is a stringent remedy, only to be used in

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the specific cases pointed out by the law, and when the facts clearly warrant it.

I confess myself to have come to this conclusion with some reluctance, because of the very suspicious circumstances which have marked the conduct of the defendant. In the armory of the law, however, there are other weapons, which the plaintiff and the other creditors of the defendant are at liberty to use, and which can be effectually wielded, both for the full discovery and the exemplary punishment of fraud. If the defendant shall ultimately be found "in this condemnation," the plaintiff will not be remediless, although deprived of the specific redress which was sought in this case.

In my opinion, therefore, the order appealed from must be affirmed, but, in consideration of all the circumstances, without costs.

SUPREME COURT.

DANIEL W. CHAPMAN and BURTON C. CROSSETT agt. GEORGE F. LEMON and SUSAN A. LEMON, his wife.

Where a husband voluntarily and absolutely deserts his wife, and renounces, so far as he can do it, his marital relations, and leaves, and continues absent from the state, the wife may be regarded as a *feme sole*. Such abandonment and absence operates like an abjuration of the realm at common law. (*See 4 Metcalf, 478.*)

The burden of proof will rest upon the party maintaining the right of the wife to act as a *feme sole*.

Where the action was brought against both the husband (who had abandoned his wife) and the wife, and it was alleged and proved, on default of the defendants, and on a reference to ascertain the facts, that the debt was contracted by the wife, and that she had a separate estate, and agreed to pay it out of her separate estate, *held*, though a judgment could not be rendered against her *in personam*, upon her contract, the court, in the exercise of equity jurisdiction, could charge the debt, as a lien, upon her separate estate.

The absent husband, having been proceeded against by publication, and the wife by personal service, the *reference* as to the husband was irregular; but as to the wife it was regular, and she could not take advantage of the irregularity.

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as to the husband—to set aside the judgment. He was a nominal party, and the only one to complain.

The *judgment* in this case was *in rem*—not against the wife personally. It was, in effect, a decree in equity, declaring the plaintiff's demand a valid lien upon the separate property of the wife. In such a case, an execution to collect the debt out of the separate property of the wife, or against her personally, is unauthorized. The mode of proceeding to enforce the judgment is for the *court* to determine—on a proper application.

No issue having been joined, the plaintiffs were not entitled to a trial fee; (\$15;) and no clerk's fees, on entering the special term order, could be allowed.

Albany Special Term, March, 1855.

MOTION to set aside judgment, &c.

The complaint alleges, that in 1853, the plaintiffs sold goods to the defendant, Susan A. Lemon, and performed labor, &c., for her to the amount of \$161; and that she promised to pay therefor out of her separate property, and did appoint the same to be paid out of her separate estate; and the plaintiffs claimed judgment for the amount stated, with interest, to be collected out of the separate property of the defendant, Susan A. Lemon. The summons and complaint were served personally on the wife, and on the husband by publication.

The defendants having failed to appear, the plaintiffs, on the 30th of January, obtained an order, at a special term, by which it was referred to a referee, "to hear and take the material proofs in the action, and to report the material facts, and his opinion thereon to the court." The referee reported that the defendants were husband and wife; that about the year 1848, the husband, who had previously resided in Troy, abandoned his wife, and went to California, and had not since returned; that the wife still resided in Troy; that she had a separate estate, which came from her father, or some other relative, and which had always been kept separate from her husband's affairs; that since her husband left, the wife had transacted business in her own name; that she contracted the debt, for which this action is brought, in her own name, and promised to pay it out of her separate estate; and that there is due the plaintiffs the sum of \$179.06.

Upon this report, the court, on the 27th of February, 1855,

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ordered judgment for plaintiffs, with costs, and that the judgment be collected out of the separate estate of the defendant, Susan A. Lemon. The costs were taxed at \$44.31, and judgment was perfected for \$223.37.

On the 4th of March an execution was issued to the sheriff of Rensselaer, requiring him to satisfy the judgment "*out of the separate personal property of the defendant, Susan A. Lemon; or, if sufficient cannot be found, then out of the separate real property and estate in the county belonging to the defendant, Susan A. Lemon, on the 27th of February, 1855, or at any time thereafter.*"

Upon the taxation of costs, there was allowed to the plaintiffs \$15 for a trial fee, and several other items, which were objected to on the motion. The defendant, Susan A. Lemon, moved to set aside all the proceedings subsequent to the service of the summons and complaint, on the ground,—

1. That such proceedings were *ex parte*, and without notice to her.

2. That the complaint and report of the referee did not entitle the plaintiffs to a judgment against her.

3. That the reference itself was unauthorized and improper, and the proofs, if any were necessary, should have been taken by the court or the clerk.

4. The plaintiffs' proceedings were, or should have been, *in rem*, and not *in personam*, and the judgment should have contained all the provisions and directions necessary for its execution; and the omission cannot be cured or supplied by the execution.

5. The costs were overcharged. The plaintiffs were not entitled to a trial fee. The clerk was not entitled to fees for entering the orders of reference and for judgment. If the reference was irregular, the fees of the referee ought not to be allowed.

MARTIN I. TOWNSEND, *for plaintiffs.*

JEREMIAH ROMEYN, *for defendant, Susan A. Lemon.*

HARRIS, Justice. At the common law the disability of co-

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verture was removed, when the husband was exiled or had abjured the realm. The wife thereby became capable of suing and being sued as a *feme sole*. (2 *Kent's Com.* 154.)

In this country it has been held, that where a husband absolutely deserts his wife, and renounces his marital rights and duties, and leaves the state, the wife may be regarded as a *feme sole*. In *Abbot agt. Bayley*, (6 *Pick.* 89,) it was held, that a residence in another state was equivalent to a residence in any foreign state. But before the wife can be treated as a *feme sole*, it must appear that the husband has voluntarily abandoned her, and, so far as he could do it, has renounced his marital relations. Such a renunciation, coupled with continued absence from the state, operates like an abjuration of the realm at common law. (*Gregory agt. Pierce*, 4 *Metcalf*, 478.)

The burden of proof would rest upon the party maintaining the right of the wife to act as *feme sole*. In this case the plaintiffs have not ventured to assume this burden, but have chosen to treat the wife as still under coverture, and seek to charge her separate estate with the payment of their debt. They allege, and have proved before the referee, that the debt was contracted by the wife, and that she agreed to pay it out of her separate estate. If this be so, though a judgment cannot be rendered against her *in personam* upon her contract, the court, in the exercise of equity jurisdiction, can charge the debt thus contracted as a lien upon the separate estate. (2 *Kent's Com.* 164; 2 *Story's Eq.* §§ 1399 to 1401; *Gardner agt. Gardner*, 22 *Wend.* 526.)

This I understand to be the effect of the judgment in this case, and the facts established before the referee warrant such a judgment. The judgment is, that the amount recovered by the plaintiffs be collected out of the separate property and estate of the defendant, Susan A. Lemon. The effect of this judgment is, to make the plaintiffs' debt a charge upon the separate property of the wife. It may be imperfect in not directing the mode of enforcing the lien; but this omission, though it may render some further application to the court

necessary, does not render the judgment, so far as it goes, invalid or irregular.

But it is insisted that the reference was unauthorized, and, of course, that the judgment founded on the report of the referee, is also irregular. As against the defendant, George F. Lemon, this might be so. He was proceeded against by publication of the summons; and in such a case the *third* subdivision of the 246th section of the Code, makes it the duty of *the court* to require proof to be made of the demand mentioned in the complaint. No authority is given to order a reference. But the defendant, Susan A. Lemon, was proceeded against by a personal service of the summons and complaint; and in such a case the *second* subdivision of the section last mentioned expressly authorizes a reference. As against Mrs. Lemon, therefore, the reference was regular; and even if it was irregular, as against the husband, as I am inclined to think it was, it does not lie with her to take the objection. He was, at most, but a nominal party; and if he does not complain of the irregularity, it is not for the wife to take advantage of it.

But, though the judgment may be upheld, as, in effect, a decree in equity declaring the plaintiffs' demand a valid lien upon the separate property of the wife, the execution was irregularly issued. The plaintiffs' attorney has entirely mistaken the mode of enforcing such a judgment as he has obtained. An execution can only be issued where the judgment requires the payment of money, or the delivery of specific real or personal property. Here the judgment only declares the plaintiffs' right to have their debt paid out of the separate estate of the wife. An execution can only be issued upon a judgment *in personam*. Here the judgment is *in rem*. It is against Mrs. Lemon's estate, and not against her personally. (*See Code*, §§ 285, 286.)

In this case, as the judgment does not contain directions for enforcing the lien which it declares, the plaintiffs, before they can proceed further, will find it necessary to apply for such directions. If the property chargeable by the terms of the judgment with the payment of the plaintiffs' debt is in the hands of a trustee, an order directing him to pay the amount of the

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judgment may be sufficient. If the property is in the hands of the wife herself, a receiver may be necessary. At any rate, the mode of proceeding is a question which must be referred to the judgment of the court. The execution clearly was unauthorized, and must be set aside.

No issue having been joined in the action, the plaintiffs could not be allowed a trial fee upon the taxation of their costs. The items for clerk's fees, on entering the special term order, were also improperly allowed. An order must be entered deducting \$15.50 from the costs as taxed, and setting aside the execution as irregular. As the defendant has succeeded but partially in her motion, neither party is to have costs as against the other.

The defendant has sworn to merits. It is probable that the questions upon which she relies have been disposed of by this decision; but as she may have some other ground of defence, the order may provide that she be let in to answer upon the payment of \$10 for the costs of opposing this motion, and \$6.68 for the costs of the reference and entering judgment.

SUPREME COURT.

ADAM PORTER agt. AMOS PILLSBURY.

An action against the superintendent of the Albany county penitentiary, personally, must be tried in that county, for the reason that he is a "*public officer*," within § 124 of the Code.

Dutchess Special Term, July, 1855.

HARRIS & COURTNEY *for defendant.*

WM. BROWER, *for plaintiff.*

DEAN, Justice. The defendant is the superintendent, or principal keeper, of the Albany county penitentiary. The plaintiff was, in 1854, by a commitment of a justice of the peace of the county of Dutchess, confined to the penitentiary of which the defendant had charge for the period of six months. During that time he was, by order of the defendant, subjected to the discipline of the prison. And the plaintiff, who, at the time of the commitment was, and now is, a resident of the county of Dutchess, brings his action for false imprisonment and assault and battery. The defendant is a resident of the county of Albany; and the complaint charges expressly, that all the illegal acts of the defendant were done in the county of Albany.

This motion is made to change the place of trial from Dutchess to Albany county. It cannot be granted on the ground of the convenience of witnesses—because, from the affidavits, and the nature of the issue to be tried, it is evident that but few witnesses will be needed on either side, and probably as many of those really necessary reside in Dutchess as in Albany county.

But the motion must be granted on the ground that the defendant is a public officer. He has the charge of a public institution. The position that he holds is, in the act establishing the penitentiary laws of 1844, chapter 152, denominated an "office," and the person who fills it is called an "officer."

The defendant is, therefore, within the reason and language of § 124 of the Code. (*People agt. Hayes*, 8 *Howard*, 248.)

The motion must be granted, with \$10 costs to abide the event.

Wells agt. Jewett, impleaded, &c.

SUPREME COURT.

WELLS agt. JEWETT impleaded with MALI, TIBBITS, JONES,
STACY and CLARK.

In an action for *false and fraudulent representations*, the complaint must state what the representations were, that the court may judge if they were sufficient to mislead; otherwise the plaintiff does not show a cause of action. It should also state that they were made with intent to deceive and defraud the plaintiff.

In such an action, where one count in the complaint is against part only of several defendants—while other counts set up causes of action against all of the defendants, it is a *misjoinder* of actions, as the causes do not “affect all the parties to the action.” (*Code*, § 167.)

Where the plaintiff, a stockholder of the company, prosecuted, in his own behalf, the directors and secretary of the company, alleging false and fraudulent representations, and fraudulent over-issue of stock of the company, and appropriating, by the defendants to their own use, the property of the company, whereby the plaintiff's stock was valueless, or nearly so,

Held, that all the stockholders having a common interest, and affected in the same proportionate degree, according to the quantity of stock each held, it was a case in which there should be but one recovery, and in which all of the same class should join, or the suit should have been prosecuted by the plaintiff for the benefit of himself and the other stockholders.

Also *held*, that the *company* was a necessary party to the action; because, if he plaintiff had no interest in the company, and was the holder only of spurious stock, which he had bought on a false representation as to the value of the stock, then his only remedy was for that wrong; and he had no right to inquire what the stock would have been worth if the affairs of the company had been properly managed. And if he was the holder of genuine stock, then the injury complained of was primarily to the company, and only incidentally to him, and the company should be a party.

New-York Special Term, June, 1855.

THE defendant, Jewett, demurs to the complaint. The complaint states, that the plaintiff is the holder of what *purports* to be one hundred shares of the Parker Vein Coal Company; that the whole number of shares of stock of the company was 30,000 of \$100 each; that the property of the company consisted of lands and steamships, worth together three

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millions of dollars; that the defendant, Clark, was secretary of the company, and the other defendants directors. It then charges that the defendants, as such directors, sold lands of this company to the Caledonia Mining Company, which was organized under the direction of Jewett; and that he, with the assent of the other directors, received in exchange stock of the latter company, a large portion of which was retained by Jewett and Mali, defendants, *or one of them*, and applied to their, *or his*, use, and never accounted for to the *stockholders* of this company.

2d. That said defendants, as such directors, sold the ships of this company to the Parker Mine Company—the directors in which company consisted of the defendants in this action, *or some of them*, and that Mali and Jewett, as managers of this last company, took possession of the ships without paying any, or if any, only a small consideration, and had the control of the vessels, and carried a large amount of freight, which was applied by M. and J. to their own use.

3d. That Mali and Jewett, with the assent of the other defendants, *fraudulently* issued shares of stock of the Parker Vein Coal Company to the amount of 28,000 shares beyond the number they were authorized to issue, and realized thereby a sum not less than a million of dollars, and applied all, or the greater part of it, to their own use: that said shares, so over-issued, are of no value, and form no part of the capital stock of the company; that these shares cannot be distinguished from the genuine shares; and that, in consequence of the fraudulent over-issue, and the other acts of the defendants, the plaintiff's stock is valueless, or nearly so.

4. That the plaintiff, believing the representations of *Mali, Jewett and Stacy*, as to the value of the stock, and being ignorant of the fraudulent issue of the stock at *or about* that time, became the purchaser of said shares, believing they were a part of the genuine stock, and having no knowledge of the over-issue. That at the time plaintiff purchased, there were assets of the company sufficient to make each genuine share worth par, "as appears from the statements of the defendants

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at the time the plaintiff became a purchaser." The plaintiff claims \$10,000 and interest, as his damages.

— — — — — *for plaintiff.*

— — — — — *for defendants.*

MITCHELL, Justice. The four different causes of action above stated are not numbered in the complaint; but are numbered here for convenience. The third and fourth may have been intended as one, and were so treated on the argument; the first and second are distinct, although each of these two is of the same character. The third and fourth, if treated as one, are for a false representation: the first and second are for appropriating to their own use the property of the company.

In *Addington* agt. *Allen*, (17 *Wend.* 386,) it was held in an action for a false representation, whereby credit was given to a third party, that even after a verdict, a count in the declaration was bad which omitted to state that the representation was made with *an intention to deceive and defraud*; and that a count was bad on *demurrer*, if it omitted to state in *what manner* the plaintiff was induced to trust the buyer, although it might be good after verdict, if it could *appear by implication* from the count, that it was on a recommendation of the buyer as *worthy of credit*. In other words, the representation made must be stated, that the court may judge if it was sufficient to mislead, or the plaintiff does not show a cause of action.

This complaint merely intimates that there were representations made by Mali, Jewett, and Stacy, *as to the value of the stock*, but what they were is not stated; nor is it stated that they were untrue, or known to the defendants to be untrue, or that they induced the plaintiff to buy, or that they were made with an intent to deceive and defraud the plaintiff; nor that they were made to the plaintiff, or in such way as to show an intention to have them communicated to dealers in the stock, or to others. That count is bad in those respects.

It also sets up a cause of action against three only of the de-

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fendants, while the other counts set up causes of action against all the defendants, or against five of them.

This is a misjoinder of actions, as the causes of action do not "affect all the parties to the action." (Code, § 167.)

In the *Franklin Fire Insurance Company agt. Jenkins and others*, (3 Wend. 130,) several persons, who had formerly been directors of the company, were sued by the company for negligence and *wilful* mismanagement of the funds of the company. On demurrer, the declaration was held bad, because it did not state *in what* the neglect or *wilful* mismanagement consisted, and for joining those two causes of action together, and for misjoinder on the ground that each director could be only severally liable for his own misconduct. The court said, "If one or more of the directors improperly *obtain or dispose* of the funds of the company, they are undoubtedly responsible, but respectively as individuals, and not jointly as directors."

The first count alleges that the land was sold by the defendants as *directors* to a company organized by Jewett, and that he, with the assent of the other *directors*, received stock in exchange, a large portion of which was retained by Jewett and Mali, or *one* of them, and applied to their, or *his* use. This shows no fraud in the directors; the sale by them may have been lawful and judicious; Jewett may have received the stock in exchange with their consent, as the agent of the company. The fault is in retaining or applying the stock to his own use; and then the complaint is defective, as it states it was retained by J. and M., or one of them, and applied to their, or his, use, which is true, if either received and retained it all; Jewett may be entirely innocent, and this count be true.

The second count alleges that the ships were sold to another company, in which these defendants, or *some of them*, were the managers; and that Mali and Jewett took possession of the ships without paying any, or if any, only a small consideration. It fails to show any fraud or wrong in this: this may be true, and good security have been given for all that the vessels were worth; or they may have been sold subject to debts, which made them worth but little. The plaintiff should show directly

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in what the mismanagement or fraud consists. That he has failed to do. If the sale was fair, Jewett and Mali had a right to the earnings of the vessel.

As has been observed in other cases before the court, facts may be stated in a complaint, which, if proved, would throw on the defendant the burden of explaining them, and yet not show a good cause of action if the complaint is demurred to: they may be evidence from which a jury may infer the fraud, which the plaintiff must establish; but as he must establish the fraud by proof, and the jury must find the fraud, so the plaintiff must distinctly allege it, when it makes part of the case, which he is to prove. No fraud, no conspiracy or combination, is here alleged.

The first and second causes of action, if true, affect, proportionally and in common, every stockholder in the company, and the corporation itself; and the third also affects the same persons, and in like manner; or if the plaintiff's view of the law be correct, then it so affects all the holders of the over-issue stock.

A single act of the defendants' in each case of the wrongful management of the affairs, in which the plaintiff, and all or either of those classes, were entitled to have a *common interest*, affects them all in the same proportionate degree according to the quantity of stock that each held. That is a case in which there should be but one recovery, and in which all of the same class should join. This could be done by one suing for himself and others. But this action is by the plaintiff for his own benefit alone; and if he first obtains judgment and execution, the others, having a common interest with him, might find nothing left from which they could be paid. This community of interest makes this case differ from cases of false representations, intended for various sellers of goods, and then communicated to such sellers, as in *Addington agt. Allen*.

It is also objected that the Parker Vein Coal Company is a necessary party to this action. The wrongs alleged in the first and second counts injure that company directly; and if the defendants should compensate the company fully, the plaintiff would have no cause of complaint. If the defendants had done

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so before this action was brought, it would be clearly so, and it can make no difference if they should do so now. If the plaintiff has no interest in the company, and is the holder only of spurious stock, which he has bought on a false representation as to the value of the stock, then his only remedy is for that wrong, and he has no right to an inquiry what the stock would have been worth if the affairs of the company had been properly managed. In this last view the plaintiff shows no cause of action in himself under those counts, but in the company only; and if he is a holder of genuine stock, then the injury is primarily to the company, and only incidentally to him, and the company should be a party. The action against Jenkins and others, above quoted, was by the company; no special and peculiar damage is shown to this plaintiff.

Robinson and others agt. Smith, &c., (3 Paige, 222,) was a bill filed by certain stockholders against persons who were directors of the New-York Coal Company. It alleged that the defendants sold the land of the company, and employed the funds in the purchase and sale of stocks; and did this for their private purposes. An objection was taken *ore tenus*, that the company should be a party, and that it was not alleged that the directors of the company were defendants, or refused to sue. The chancellor held that, "generally when there has been a waste or misapplication of the corporate funds by the officers or agents of the company, a suit to compel them to account for such waste or misapplication should be in the *name of the corporation*; but that if the directors refused to prosecute, by collusion with those who had made themselves answerable by the negligence or fraud, or if the corporation was still under the control of those who must be made the defendants in the suit, the stockholders would be permitted to file a bill in their own names, *making the corporation a party* defendant. And if the stockholders were so numerous as to render it impossible or very inconvenient to bring them all before the court, a part might file a bill in behalf of themselves and all others standing in the same situation,"—and he allowed the demurrer.

This is consistent with the cases of *Christopher agt. The*

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Mayor of New-York, and of De Baum, &c. agt. The Same, and of Milhau agt. Sharpe, and other cases; in those the corporation was a party, or the object was only to obtain an injunction against the individuals who were defendants. If the defendants have been guilty of the wrongs with which it is intended to charge them, it is important that the action be properly commenced, so that justice may not be defeated in the end. And whether the defendants be guilty or innocent, the charges should be so distinct that they may know what they have to meet, and with such parties before the court, that a final determination of the matter may be made.

The demurrer in this case is allowed, with leave to the plaintiff to amend, if he be so advised, on payment of costs of the demurrer.

SUPREME COURT.

MILTON GOBLE agt. ZACHARIAH KINNEY.

Under § 399 of the Code, it is not necessary to give ten days' notice of the examination of an *assignor* as a *witness*, where the action is against the *party personally*. That notice is necessary only where the action is against the party in a *representative capacity—en autre droit*. (*See 7 How. Pr. R. 1; 16 Barb. 580, & 18 id. 532 adverse.*)

Jefferson General Term, July, 1855.

W. F. ALLEN, F. W. HUBBARD, D. PRATT, W. J. BACON,
Justices.

THIS action originated in a justice's court, and was brought to recover the price of certain sap-buckets and a thrashing machine, sold and delivered by James Bradford to the defendant.

The cause of action was assigned, by Bradford, to the plaintiff. On the trial, Bradford was offered as a witness for the

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plaintiff, and objected to by the defendant, on the ground that no notice, in writing, of his intended examination as the assignor of the claim, had been given under § 399 of the Code. The objection was overruled, and the witness permitted to testify.

A judgment for the plaintiff was rendered by the justice, which was reversed by the county court on appeal.

M. B. CHURCH, *for plaintiff.*

D. C. GREENFIELD, *for defendant.*

By the Court—HUBBARD, Justice. It was a question of fact for the justice to decide, whether the sale of the machine was conditional or absolute. There was evidence, from which the fact could be found that the sale was absolute, vesting the title in the defendant, and a right of action in Bradford, to recover the price, with a right of recoupment by the defendant, if the stipulated repairs were not made according to the agreement. Upon the conflicting evidence in the case, the finding of the justice must be held conclusive.

The most important question is in relation to the competency of Bradford, the assignor, as a witness in behalf of the plaintiff, his assignee, without previous notice in writing, of ten days, of his intended examination.

In a case like this, I think the notice was not necessary. It has been the settled practice in this judicial district, at circuit, and the principle has also been held at general term, not to require notice except the action is against an *assignee, or executor or administrator*; in other words, not to require notice in any case, when the action is against the *party personally*, who made the contract, or incurred the obligation on which the suit is predicated.

This I deem the fair and reasonable construction of § 399 of the Code.

The section states the general principle of the admissibility of an assignor of a thing in action or contract, in behalf of his

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assignee, and the right of the adverse party to defend himself by his own oath.

Thus far the section is free from ambiguity or difficulty. But the exception to the general rule has occasioned some diversity of opinion. The exception relates to a class of cases where the defendant in the action is sued in a *representative character*, as an assignee, or executor, or administrator. In those cases, and those alone, (except when the action is for the immediate benefit of the assignor,) it seems to me, the section was intended to disqualify the assignor as a witness for his assignee, unless, in the first place, the other party to the contract, or thing in action which the defendant represents, is living, and his testimony can be procured for such examination; and, in the second place, unless the ten days' notice, in writing, specifying the points of examination, be given to the adverse party.

These two conditions of the competency of the assignor, are embraced together in one sentence of the section; and, in my judgment, it was intended by the legislature that the latter, as well as the former, should apply solely to a case where the defendant is sued, *en autre droit*. After the word *nor*, in the sentence, in order to its grammatical construction, there should be implied the words of the commencement of the section, to wit, "shall such assignor be admitted to be examined in behalf of any person deriving title through or from him, against an assignee or an executor, or administrator, unless," &c. The section, it seems, would have been differently framed, if it had been intended to establish the general rule, that, in *all cases*, the notice should be given. The clause expressive of that intent would have found a more suitable and less ambiguous place in the second sentence of the section. As the section is framed, the obvious reading and import is, I think, to limit the exception and condition of the competency of the assignor, to cases, as before remarked, where the defendant is prosecuted in a *representative capacity*.

This construction conflicts with the practice and decisions in other districts; (7 *How.* 1; 16 *Barb.* 580; 18 *id.* 532;) but as those decisions are only of concurrent authority, although en-

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titled to the highest respect, the mooted question must be deferred to the court of last resort for final adjudication.

In this view of the case, it will not be necessary to inquire whether § 399 of the Code applies to justices' courts.

The judgment of the county court must be reversed, and that of the justice affirmed.

SUPREME COURT.

JOHN L. SUTHERLAND agt. OSCAR TYLER, sheriff, &c.

Before the amendment of the 349th section of the Code, in 1852, a decision sustaining or overruling a demurrer could not have been *appealed* from, until after all the issues had been disposed of, and final judgment perfected. That amendment authorizes an appeal before judgment.

But a party cannot, under § 349 as amended, perfect judgment on an issue of law, while there are issues of fact undisposed of.

Where the plaintiff appealed from the decision overruling the demurrer as a judgment, and not as an order, and the defendant perfected judgment upon the decision on appeal, while there were questions of fact undisposed of, *held*, that both parties were in error in their practice; and it appearing that the decision on the question of law was final in the case, and no motion having been made to set aside the judgment, the plaintiff's appeal was regarded as having been taken from an order, and a question of costs finally disposed of.

In such case, the defendant should have taxed his costs as upon the trial of an issue of law, \$12, instead of \$15 before argument, and \$30 upon the argument.

Albany Special Term, March, 1855.

MOTION for readjustment of costs.

The action was brought by the plaintiff as assignee of Joel B. Nott, to recover the sum of one hundred dollars, alleged to have been paid upon an execution against Nott, in the hands of a deputy of the defendant. It was alleged in the complaint that, after such payment, the execution had been returned wholly unsatisfied; and that since such return, Nott, the defendant, had been compelled to pay the whole amount of the judgment.

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The defendant, in his answer, denied the allegations in the complaint, relating to the payment of the money by Nott to his deputy, and then set up by way of defence, the recovery of a judgment against Nott, in an action by the assignee of the judgment upon which the execution had been issued, in which the payment of the money to the defendant's deputy had been put in issue, and found against the defendant in that action.

To this part of the answer, the plaintiff, in August, 1851, demurred. The demurrer having been argued at a special term, an order was made by the court overruling the demurrer, and allowing the plaintiff to withdraw the same, and reply within twenty days, on payment of costs. After this decision, a stipulation was executed by the parties, whereby it was agreed, that the plaintiff should have until, and including, the 15th of July, 1853, for the purpose of withdrawing his demurrer to the answer, replying and paying costs; and that, if such demurrer should not be withdrawn, and the costs paid, by that day, the defendant should be at liberty to perfect judgment for \$96.98 costs.

The plaintiff, not having complied with the terms of the stipulation, the defendant, on the 16th of July, entered judgment for ninety-six dollars costs of the "said issue of law."

On the 15th of August, 1853, the plaintiff's attorney served upon the defendant's attorney a notice of appeal "*from the judgment entered on the 16th of July for ninety-six dollars, and striking out the demurrer of the plaintiff.*" The appeal was brought to a hearing at the Albany general term, in February, 1855, and, according to the affidavit upon which the motion was founded, the court "*decided adversely to the plaintiff, and dismissed said appeal.*"

The defendant entered judgment for \$115.52 costs upon the appeal. Upon the taxation of costs, the plaintiff's counsel insisted that the defendant was only entitled to the costs of a motion. The plaintiff moved for a retaxation of the costs.

CHARLES C. NOTT, *for plaintiff.*

JOHN K. PORTER, *for defendant.*

HARRIS, Justice. The answer of the defendant in this case, though quite informal, contains three distinct defences. At the time the answer was put in, a demurrer to an answer was authorized, and the plaintiff accordingly demurred to the second defence. The case was thus put in readiness for a trial upon issues of fact formed by the first and third defences, and an issue of law formed by the demurrer. The issue of law alone was tried. The decision was in favor of the defendant. The condition annexed to the decision was not accepted by the plaintiff, and the defendant became entitled to judgment upon the issue of law, unless the decision should be reversed upon appeal. The amount of the costs upon the demurrer having been fixed by the agreement of the attorneys, the defendant, without reference to the issues of fact remaining undisposed of, undertook to perfect a judgment in the action for the costs upon the issue of law. This he could not regularly do. A judgment is defined to be "a final determination of the rights of the parties." Such "final determination" could not be made, so long as there were issues of fact between the parties which had not been tried. The judgment entered upon the decision of the demurrer, amounted to nothing more than an order of the court overruling the demurrer, and declaring the right of the defendant to judgment upon that issue. But for the amendment of the 349th section of the Code, adopted in 1852, a review of the decision upon appeal could not have been had, until after all the issues had been disposed of and final judgment perfected. That amendment authorized an appeal before judgment.

Both parties have erred in their practice: the defendant, in perfecting judgment upon the issue of law, when several issues of fact remained upon the record undisposed of; and the plaintiff, by appealing from the decision upon the demurrer as a judgment, and not as an order. But, though the appeal was, in form, an appeal from a judgment, I can see no objection to giving effect to the decision of the general term upon such appeal, as an appeal under the second subdivision of the 349th section of the Code.

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For the reasons already stated, the defendant was also irregular in perfecting judgment upon the decision of the general term. There can be but one final judgment in the same action. By that judgment all the points in controversy between the parties must be determined. The record of this judgment does not show such a determination.

But as the decision of the demurrer is evidently fatal to the plaintiff's action, and no motion has been made to set aside the judgment as having been prematurely entered, I proceed to consider the question of costs presented by this motion.

Regarding the appeal as really an appeal under the 349th section of the Code, though in form an appeal from a judgment, the case is brought directly within the decision in *Van Schaick agt. Winne*, (8 How. 5,) and the defendant, instead of taxing costs as upon an appeal from a judgment, should have taxed his costs as upon the trial of an issue of law. Then he would have been allowed twelve dollars for the trial of the issue of law before the general term, instead of *fifteen* dollars before argument, and thirty dollars upon the argument of the appeal. *Thirty-three* dollars must, therefore, be deducted from the costs as taxed.

Neither party should have costs upon this motion.

SUPREME COURT.

BELL agt. MALI, JEWETT and STACY.

GAILLARD agt. THE SAME.

Where the plaintiff, in his complaint, alleged that under the false representations of the defendants, that only the legitimate number of shares of stock of the company had been issued, he bought stock of the company at a certain time, but omitted to show or allege that *at that time* the stock had been over-issued, and showed that the over-issue was after he bought,
Held, that the complaint was fatally defective in showing title, or right to bring

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the action. It was material to the plaintiff's case, so far as he relied on a false representation, to show directly that the representation was untrue when made.

The complaint also stated, that the genuine stock could not be distinguished from the false, and that thereby the plaintiff sustained a loss.

Held, that if the false stock was valueless, the loss could not result, or if it could the plaintiff should show how. And if the over-issued stock was valid, and bound the company, then the injury was primarily to the company, and only indirectly to the plaintiff; and the company should sue, or be made a party defendant, and the plaintiff sue for himself and all other stockholders. (See *Wells agt. Jewett*, ante page 242.)

The false representation, with proper averments, would give a cause of action to the plaintiff alone; the mere over-issue would give a cause of action to the company; or the plaintiff and all the other stockholders. But the two matters could not be joined in one complaint.

To justify an *arrest*, it must appear to the judge by affidavit, "that a sufficient cause of action exists." (*Code*, § 181.) The omission to state in the complaint in this case so material a part of the cause of action, held to be a failure to comply with the requirements of the Code.

On an application for an order of arrest, or to sustain such an order, the material statements in the affidavits, if on *information* and *belief* merely, should show how the information was derived, and why the person communicating it did not make the affidavit.

The *stock* of all companies about to be engaged in mining operations must have only a fancy value. The market value, therefore, must be assumed to be the real value, when no more certain test is shown.

New-York Special Term, June, 1855.

MOTION to discharge defendants from arrest, or to reduce their bail.

— — — — — *for defendants.*

— — — — — *for plaintiffs.*

MITCHELL, Justice. The complaint in the first of these cases somewhat resembles that in *Wells agt. Jewett*, (ante page 242,) but differs in three respects. There is apparently but one count intended; the plaintiff alleges that he is the holder of genuine stock, and does not set forth the sale of the lands or ships of the company, and so omits the first two counts contained in that case. The allegations of fraud are much more distinct, and are direct against all three of these defendants.

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It, however, shows a fatal defect of title, or of right to bring this action. It alleges that all the plaintiff's stock was bought in 1853, except a small part bought in the early part of 1854; and that it was bought under representations of the defendants, that only the legitimate number of shares of stock had been issued, but omits to show that, *at that time*, any more had been issued: and it shows that the over-issues were after that time—stating that it was while the defendants were directors, and *previous to the first day of June, 1854*. This seems to *imply* that the over-issue was about that time; and it was material to the plaintiff's case, so far as he relied on false representation, to show directly that the representation was untrue when made: he cannot show that the defendants represented that there was no over-issue when he bought, and then show, as proof of the falsity of that representation, that they afterwards made the over-issue.

The complaint proceeds to state that the genuine stock could not be distinguished from the false, and that thereby the plaintiff sustained a loss. If the false is valueless, this loss could not result, or if it could, the plaintiff should show how it does result. If the over-issued stock is valid, and binds the company, then the injury is primarily to the company, and only indirectly to the plaintiff, and the company should sue, or if the company will not sue, it should be made a defendant, and the plaintiff sue for himself and all other stockholders. (*See opinion in Wells agt. Jewett, ante page 242.*)

The complaint in *Gaillard agt. Mali* has the same defects as in that of *Bell*.

The false representation, with proper averments, would give a cause of action to the plaintiff alone,—the mere over-issue would give a cause of action to the company or to the plaintiff, and all the other stockholders,—so the two matters should not be joined in one complaint.

The plaintiff alleges in *Bell agt. Mali, &c.*, and shows that his purchases of stock were made in 1853, except one purchase on Feb. 3d, 1854. The over-issues, he alleges, were between June 1853, and June 1854: so they *may* all have been since

Feb. 3d, 1854, and then the plaintiff would have no cause of action for the false representation, as it could not have induced him to buy.

To justify an arrest, it must appear to the judge, by affidavit, 1st, "That a sufficient cause of action exists." (*Code*, § 181.) The omission to state so material a part of the cause of action, is a failure to comply with this requirement.

The plaintiff's affidavits show a connection between Stacy and Mali as to the over-issue of the stock, but not as to any authority from Mali to Stacy to make misrepresentations as to the over-issues: they show no representations made by Mali himself: he promised to render a statement, and did not make it; but that was not a representation of an existing fact.

In July, 1853, Stacy was asked, if all the stock was issued, and if more would be issued: he answered, that the 30,000 were issued, but that, by their charter, the company had power to issue 10,000 shares more, but that no more would be issued. The statement as to the power given by the charter may have been an error as to the law, and on a question on which the plaintiff could judge for himself by reference to the charter. The promise was no representation. He was asked why the stock was going down, and attributed it to speculation by brokers.

It does not appear that, at *this time*, the over-issue was begun. He made similar answers to similar inquiries in January, 1854. It may be that the over-issue had then taken place, and as he began to answer, and professed to give an account of the cause of the fall of the stock, he was liable if he concealed other, or the true causes of the fall, with the intent to deceive and defraud the dealers in the stock. (*See Addington agt. Allen, quoted in Wells agt. Jewett, ante page 242.*) But the time of the over-issue is material, and Mali should be shown to have authorized the statements made. It might be consistent with the plaintiff's statements, that Mali relied on a supposed right in the company to issue to a larger extent; or according to his own, that he knew nothing of them. No application was made to Jewett for information.

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In relation to the amount of the bail to be given, it should be shown what the plaintiff paid for the stock bought after the alleged false representation was made to him; that would have some influence on the amount of bail, and even on the amount of the recovery. If the lawful issue could be only of 30,000 shares of \$100 each, and the over-issues were 28,000 shares, then each share, if there had been no over-issue, would sell for \$100, but by the over-issue would sell for about \$70; so the plaintiff might expect it would rise to 3-7 more than the market price, and be induced to buy accordingly. All that he lost, or failed to gain, by the misrepresentation, would be 3-7 of the market price; the rest of the fall was from depreciation from other causes. If (as Mali states his belief) the plaintiff bought when the stock was selling for ten per cent. of its par value or less, the plaintiff's loss on 450 shares, so far as it was occasioned by the false statements as to over-issues, could not have exceeded 3-7 of \$4,500, (the purchase money,) or less than \$2,000, and the bail, if required, should be reduced accordingly.

In the defendants' affidavits, Jewett shows that he overdrew his stock account, and seems to suppose he had an excuse for it, because the company owed him money, and he held the stock as collateral. This would avail him but little, if the other grounds of the action were well sustained. He, however, denies all false representation. Mali also denies all false representation or intention to deceive, and states that he left the certificates of stock, in blank, with the secretary, and that this was usual in this city, and that he did not know of the over-issues, and has received none of the avails of that transaction.

As the defendants' affidavits are received on motions of this kind, and the plaintiff does not state any representation which Mali made, that could be a cause of arrest, and does not state any made by Jewett, the weight of the evidence is in favor of these two defendants.

It would be different with Jewett, as he received so much of the stock and its avails, if it could be inferred that Stacy was acting with or for him: that may be inferred as matter of fact,

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as Stacy would hardly overdraw, or allow Jewett to overdraw, so largely, if there were not a concert and conspiracy between them.

Another objection to many of the statements in the plaintiff's affidavits is, that they are on information and belief only, and how the information was derived, and why the person communicating it did not make the affidavit, and what he said, is not stated.

Gaillard's affidavit charges misrepresentations in general terms, which can be of no avail on such a motion. It, however, proceeds to particularize representations made by Mali, and by Stacy; that Mali said the stock had fallen so much on account of stock-jobbing operations; and being asked what it would be worth if the company should be forced into liquidation, said he *could not tell*, but he had no doubt the stockholders would even then realize 30 per cent.; and when the stock had declined to 12 or 13 per cent., Mali assured the plaintiff, who was inquiring for a friend, that the stock was good, and advised him not to sell at such a sacrifice. The statements of Stacy are very like those in Bell's affidavit.

The affidavits of Mali and Jewett, in this case, are similar to theirs in Bell's.

There is the same objection to the plaintiff's affidavit in this case, that it is mostly on information and belief; that it does not show that Mali did not believe his statements to be correct, or that at the time spoken of they were not correct; and if another allegation of the plaintiff be true, that the stock was worth par but for the over-issues, then the over-issues being to such an amount as reduced the value of the stock only about 3-10, his statements were true, and the stock was worth over 30 per cent. to the stockholders, and it would have been a sacrifice to sell it at 13 per cent.

It may be natural to those who suffer by these wrongs of certain individuals, to attribute the whole loss on their speculations to those wrongs; but it is the business of courts to scrutinize the facts, and endeavor to discover how far the loss is attributable to that cause. The stock of all companies about

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to be engaged in mining operations must have only a fancy value, and their real value cannot be ascertained until the experience of several years at least after they have been in actual operation, and bringing their produce to market. The market value must be assumed to be the real value, when no more certain test is shown, and that in this case was only 30 per cent, at the highest time alluded to. The plaintiff's loss by any representation should be estimated on such a valuation.

As the complaints in both actions are defective, and the affidavits imperfect, both Jewett and Mali should be discharged from the arrest, with \$10 costs of motion in each case, unless the plaintiffs in each case elects in five days to pay those costs and to amend his complaint so as to conform to the views here stated, and to put in affidavits supplying the defects here pointed out, and then serves his new affidavits and amended complaint in fifteen days thereafter. The defendants to have the right to answer such new affidavits, and to renew the motion for their discharge without serving any papers not already served.

SUPREME COURT.

EDWIN P. GREEN agt. WILLIAM TELFAIR.

A judge has no right to threaten or intimidate a jury, who are unable to agree upon a verdict, in order to affect their deliberations. Nor should he allude to his own purposes as to the length of time they are to be kept together. There should be nothing in his intercourse with the jury, having the least appearance of duress or coercion.

A jury, while all *proper motives* to induce them to agree upon a common result, may be repeatedly and earnestly urged upon them, should be left to feel that they act with entire freedom in their deliberations. That, should they continue to disagree, they are not to be exposed to unreasonable inconvenience; nor to receive the animadversion of the court.

A judge may keep the jury together as long as, in his judgment, there is any reasonable prospect of their being able to agree, but beyond this he is not at liberty to go.

Greene Special Term, Nov., 1853.

MOTION to set aside verdict, &c.

THE action was for libel and slander. It was tried at the Greene circuit in November, 1852. The trial was concluded, and the cause submitted to the jury between two and three o'clock on Saturday afternoon. It was the last cause tried at the circuit. The jury, after having been absent several hours, returned into court, and stated that they were unable to agree upon a verdict, and asked to be discharged. The judge who presided at the circuit, according to the affidavits of the plaintiff's counsel and two of the jurors, which were read upon the motion, stated to the jury that it was very important that they should agree upon a verdict. That the case had excited considerable feeling, which would be increased if they should separate without agreeing; that the very nature of a jury trial implied concession and compromise; that no one juror should control the result, or otherwise the verdict would be the verdict of one man, and not of the twelve; that both parties had taken exceptions to decisions made during the progress of the trial, and it was necessary, before these decisions could be reviewed, that there should be a verdict of some kind; that for five years he had discharged but one jury because they were unable to agree; and he should send the jury out again, and hoped they would agree.

One of the jurors remarked, that he supposed their duties would be at an end, and that they would be discharged at twelve o'clock that night; to which the judge replied, that this was not so; that he was authorized to receive their verdict on Sunday: and besides, that it was his intention to go to Albany by the next train of cars; and if they should not agree before he left, that he would return on Monday and receive their verdict.

Affidavits of two other jurors, and one of the attorneys for the defendant, were read in opposition to the motion; but they did not materially vary the facts above stated.

The jury, after they retired the second time, remained absent

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about half an hour, when they again returned into court, and rendered a verdict of six cents for the plaintiff.

The plaintiff moved to set aside this verdict, on the ground of what transpired when the jury came into court, and reported their inability to agree.

LYMAN TREMAIN, *for plaintiff.*

HENRY HOGEBOOM, *for defendant.*

HARRIS, Justice. It is both proper and commendable, that a judge, after the labor and expense of a trial, should endeavor, by all legitimate means, to secure a verdict. To this end he may properly urge the jury to engage in their deliberations in a spirit of liberal concession. He may properly explain to them the theory of the trial by jury; that its object is to give to the parties the united judgment of twelve minds, upon the questions at issue between them. He may properly invite their attention to the importance, both to the parties and the public, of their agreeing upon a verdict; that thus the time and expense of a re-trial may be saved. These, and other kindred considerations may, and frequently ought to be urged upon the consideration of the jury, to induce them to make an honest and faithful effort to bring their minds together, and thus agree upon a verdict.

A judge may also keep the jury together as long as, in his judgment, there is any reasonable prospect of their being able to agree; but beyond this, I do not think he is at liberty to go. An attempt to influence the jury, by referring to the time they are to be kept together, or the inconvenience to which they are to be subjected, in case they shall be so pertinacious as to adhere to their individual opinions, and thus continue to disagree, cannot be justified. A judge has no right to threaten or intimidate a jury, in order to affect their deliberations. I think he has no right even to allude to his own purposes as to the length of time they are to be kept together. There should be nothing in his intercourse with the jury having the least appearance of duress or coercion. The jury, while all proper motives to in-

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duce them to agree upon a common result, may be repeatedly and earnestly urged upon them, should be left to feel that they act with entire freedom in their deliberations. That, should they continue to disagree, they are not to be exposed to unreasonable inconvenience, nor to receive the animadversion of the court.

In view of these relations, between the court and the jury, it is very evident that my esteemed associate, actuated by a laudable desire to avoid the necessity of another trial, and in his haste to close the circuit, has inadvertently stepped quite beyond the line of duty—when he told the jury that exceptions had been taken by both parties, and that a verdict of some sort was necessary, before a final decision of these questions could be had—it might well have been inferred by the jury, that it was a matter of no great importance what their verdict should be. Perhaps this is the most natural interpretation to be put upon the language of the judge upon this subject. And again, when he told the jury, that for five years he had discharged but one jury, on account of their being unable to agree, it was a significant hint, that though they were then at the close of the circuit, and of the week, yet, however desirable or important it might be for them to return home, they should be kept together until they were able to render a verdict. This intimation was still more distinctly expressed when the judge informed the jury of his intention to return home, leaving them in charge of an officer, and to come back on Monday to receive their verdict. It is not surprising that, though after several hours deliberation, the jury had declared that it was impossible for them to agree, such motives as those to which I have alluded should have the effect to produce a verdict in half an hour. But a verdict thus obtained ought not, I think, to be conclusive upon the parties. It is not what the law contemplates—the free and independent judgment of twelve indifferent men, acting without constraint, and with sole regard to the obligation they had taken upon themselves to render a true verdict according to the evidence.

I think sound policy, and a faithful maintenance of the right

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of trial by jury, requires that this verdict should not be allowed to stand. The motion to vacate it must, therefore, be granted. The costs of the motion are to abide the event of the suit.

NEW-YORK COMMON PLEAS.

CONDERT, respondent, agt. LIAS, appellant.

On moving to dismiss an appeal from a justice's judgment, because the return has not been filed, the moving party has only to show the proper service upon the opposite party of the *notice*, of ten days, required by the rule. That is, he need not show *affirmatively* that the return has not been filed, as required by § 160 of the Code, (within thirty days.)

General Term, May, 1855.

INGRAHAM and DALY, Judges.

THIS was an appeal from a judgment of the district court of the city of New-York for the second district.

The respondent moved to dismiss the appeal, and read a notice of motion to the effect that the appellant was required to procure the return to be filed on or before the fourth Wednesday of May, 1855, or the respondent would, on that day, move the court, at the general term, for an order dismissing the appeal.

I. T. WILLIAMS, *for the appellant,*

Objected, that the notice did not comply with the rule, which provides that the notice shall require the return to be filed within ten days thereafter.

INGRAHAM, *first Judge.* When was the notice served?

CONDERT, *in person,*

On the 16th day of May, twelve days ago.

INGRAHAM. That is a compliance with the rule.

WILLIAMS then objected, that there was no evidence that the time prescribed in § 160 of the Code had expired.

INGRAHAM. That must be shown in opposition to the motion. The rule is express on that subject: it only requires the notice; and it has been the uniform practice of this court to require nothing more. The motion must be granted, unless the appellant procure the return to be made so as to bring it to hearing at the next term, and pay the costs of this motion.

WILLIAMS. If this has been the practice of this court, I submit, with great deference, that it is not what the bar have a right to understand the practice to be from the reading of the rule. The section of the Code referred to in this rule, gives the justice thirty days to make and file his return. The rule then provides, that if the justice do not file his return within this period, the respondent may move to dismiss the appeal. A party moving should show himself in a position to move: he asks affirmative relief, and should show affirmatively his right to such relief. If the court could, in such a case, indulge in any presumption, it would be in favor of an officer, especially a judicial officer. The court will presume that an officer has done his duty until the contrary appears.

It is not pretended here that there is any evidence whatever before the court that the thirty days have expired. If this be a case where the court will require us to show that we are not in fault, in order that we may not be mulcted in costs, then there should be some good reason for making this case an exception to a rule as ancient and as universal as any known rule of law. There is not a circumstance within the knowledge of this court, that shows, or tends to show, that the notice of appeal in this action was served more than twelve days ago. And if the court have a rule which compels them to grant this

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motion, as already intimated by his honor, the first judge, that rule requires immediate revision. It is, however, submitted, with great confidence, that such is not the fair construction of the rule; but, on the contrary, the rule itself requires that it should be shown that the time prescribed by the Code had expired.

DALY, J. (After consulting with the first judge.) We don't see how we can change the ruling in this case. Let the order be entered as indicated by the first judge.

SUPREME COURT.

JOHN G. REILAY and HIRAM WOOD agt. ANSEL THOMAS and
WILLIAM PARKER, JR.

To a mere answer, which sets up no counter-claim, but merely defensive,—such as alleged payment of a note before its transfer,—no reply or demurrer is necessary; and none is admissible. (*See 9 How. Pr. Rep. 143, to the same point.*)

New-York Special Term, October, 1854.

Complaint.

THE complaint of the above-named plaintiffs against the above-named defendants in this action, respectfully states and shows to this court.

1st. That the plaintiffs now are, and, for some time past, have been, co-partners in trade, doing business under the name and style of "Reilay & Wood."

2d. That on or about the 10th day of January, 1854, at the city of New-York, the above-named defendant Ansel Thomas, at the city of New-York, duly made his promissory note, in writing, of that date, whereby, for value received, he promised to pay, four months after the date thereof, to the order of the

defendant William Parker, jr., at the Greenwich Bank, the sum of \$127 20-100.

3d. That before the maturity of the said note, the said defendant William Parker, jr., duly endorsed the same to the plaintiffs; that when the said note became due and payable, it was duly presented for payment to the defendant Ansel Thomas, at the said Greenwich Bank, and payment thereof was duly demanded, but the same was not paid, nor any part thereof; and that the same was thereupon duly protested for non-payment, and that due notice thereof was given to the defendant William Parker, jr.

4th. And the plaintiffs further say, that they are now the lawful owners and holders of said note, and that the defendants are, and each of them is, justly indebted to the plaintiffs thereon in the sum of \$127 20-100, and the interest thereon from the 13th day of May, 1854, together with seventy-five cents fees and expenses of protesting said note.

Wherefore the plaintiffs demand judgment against the said defendants respectively, for the said principal sum and interest, and fees of protest, besides the costs of this action.

The separate answer of Ansel Thomas, one of the defendants in this action, states, and shows to this court.

1st. This defendant admits that he made and executed the promissory note set forth in said complaint, and delivered the same to the said William Parker, jr.

2d. This defendant further says, that he paid and fully satisfied the said promissory note to the said Parker; that such payment and satisfaction of the said promissory note was made to the said Parker, while he, said Parker, was, as defendant is informed and believes, the owner and holder thereof—the same having been made in the month of February, 1854.

3d. The defendant is ignorant, and has not knowledge sufficient to form a belief, as to whether the said Parker endorsed the said promissory note to the said plaintiffs, as stated in the complaint.

4th. This defendant believes, and therefore insists and charges, that said plaintiffs are not *bona fide* holders of the said

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promissory note, for a valuable consideration paid by them therefor, before the maturity of said promissory note.

The plaintiffs demur to the second count of the answer of the defendant Thomas, to the complaint in this action, which count is in the following words, viz:—

“This defendant further says, that he paid and fully satisfied the said promissory note to the said Parker; that such payment and satisfaction of the said promissory note were made to the said Parker, while he, said Parker, was, as defendant is informed and believes, the owner and holder thereof—the same having been made in the month of February, 1854.”

And the plaintiffs assign as a ground for said demurrer, that the allegations in said count constitute no defence in law to the complaint herein, in this, to wit: that it is not alleged that the plaintiffs had knowledge of such payment and satisfaction at the time of the endorsement and transfer of said note, by said Parker, to the plaintiffs.

M. L. TOWNSEND, *for plaintiffs.*

GEO. A. SHUFELDT, *for defendant.*

ROOSEVELT, Justice. The plaintiffs' law, in this case, on the merits, may be perfectly good, but he has not availed himself of it in the proper manner. The Code, unless in very clear cases of the fitness of that mode of procedure, discourages, and for the best of reasons, as shown by Mr. Justice HARRIS, (9 *How. Pr. R.* 143,) the usually dilatory pleading by demurrer. To a mere answer—an answer setting up no counter-claim, but merely defensive—such as alleged payment of a note before its transfer—no reply or demurrer is necessary, and none therefore is admissible. The cause, without further written pleadings, should be immediately set down for trial on all the issues: and the same judge, whether they be questions of law or questions of fact, and with or without a jury, as the case may be, disposes, at one time and in one hearing, of the whole controversy.

The plaintiffs' demurrer, therefore, is irregular, and must be set aside with \$10 costs of the motion, to abide the final event.

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SUPREME COURT.

SARAH SHEARMAN agt. THE NEW-YORK CENTRAL MILLS
and others.

Where the plaintiff obtains an *injunction*, which, with the proper undertaking, is served upon the defendant, and during the progress of the cause the plaintiff serves a notice upon the defendant waiving the injunction, the defendant is not then entitled to an order of reference to ascertain his *damages*; because, the court must "*finally decide that the plaintiff was not entitled thereto.*" (*See Code*, § 222.) Until this point is reached in the progress of the action, the application for a reference to ascertain damages is premature.

Oneida Special Term, July, 1855.

THE material facts upon which the question on this motion arises are, that at the May special term at Herkimer county, an injunction was granted in this suit upon a complaint showing upon its face ample ground therefor. This injunction, among other things, restrained the sale of the real estate of the defendants, The New-York Central Mills, upon two judgments, known as the Rockwell and Ferry, and the Matteson and Johnson judgments. A copy of this injunction was duly served on the several defendants, and continued operative until the 29th day of June last, when the plaintiff's attorneys served a notice upon the attorneys of defendants, that they withdrew and abandoned so much of the injunction as stayed proceedings upon either of the above-named judgments, or any execution issued thereon. Prior to the service of this notice, Burton D. Hurlburt, one of the defendants, had employed an attorney, who was making preparation, by drawing affidavits, &c., to move the court for a dissolution of the injunction. In the opposing affidavit on the part of the plaintiff, the reason is given why the injunction was withdrawn to the extent stated in the notice, and it is sworn that the plaintiff has no intention of abandoning the suit, but is proceeding with all diligence therein, and in the usual manner, with the intention of bringing the same to a hearing and decision.

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The defendant Hurlburt, upon these facts, now applies for leave to enter an order vacating the injunction to the extent indicated in the notice, and also for a reference to ascertain the damages he has sustained by reason of the issuing and service of the injunction.

E. W. DODGE, *for motion.*

M. H. THROOP, *opposed.*

BACON, Justice. In respect to the first part of the motion, no application to this court was necessary. The notice *ex proprio vigore* operated as a withdrawal and abandonment of the injunction to the extent therein specified, and authorized the defendants to take any proceeding they lawfully could, entirely unembarrassed by the injunction order in the respect in which it had stayed their proceedings.

If the parties desired anything to appear on the record of the court in any more formal manner, they could, on filing the stipulation with the clerk, have entered a common order to that effect. The motion, in that aspect of it, was, therefore, entirely unnecessary.

The question, then, is, whether the defendant, who claims to have been damnified by the issuing of the injunction, is entitled, in this stage of the cause, to an order of reference to ascertain the amount.

The Code, § 222, provides, that when an injunction like the one in this case is issued, an undertaking shall be given on the part of the plaintiff, with or without sureties, to the effect that the plaintiff will pay to the parties enjoined such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if *the court shall finally decide* that the plaintiff was not entitled thereto. Such an undertaking following precisely the language of this section, was executed by two sureties, on behalf of the plaintiff—she not uniting therein.

Now it seems to me, it is only necessary to look at the language of the section above cited, and the undertaking which follows its provisions, to show that several conditions must ex-

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ist, before the right to claim an assessment of damages and a forfeiture of the undertaking, which is the necessary corollary to the order, can be maintained. For,

(1.) "The court" must decide that the plaintiff was not entitled to the order.

(2.) This must be a final decision; that is, made at the termination of the cause by a decree or judgment therein, or by the voluntary discontinuance of the suit. And;

(3.) The decision, or adjudication, must be, that the plaintiff "was not;" that is, was not at the time he applied for and obtained the injunction, entitled thereto.

Now, neither of these things can be said, with any plausibility, to exist, when a party voluntarily withdraws his injunction. He may be willing, for reasons of expediency, or because he deems it no longer necessary to effect the special object he had in view, to waive his injunction, when, upon the whole case, he might very properly have retained it, and be fully entitled to all the relief he claims.

The undertaking in this case is the undertaking of sureties—and their obligation is always deemed one of the most strict right. They are entitled to a construction of the statute and their obligation, which shall carry out not only its import, but clearly fulfil all its terms and conditions. They cannot be proceeded against, therefore, until all the qualifications exist under which they assumed the obligation which their undertaking creates. In other words, not until the court has finally decided that the plaintiff was not entitled to the injunction at the time the order was obtained.

The section of the Code under which the injunction was given, corresponds, in substance, with the standing rule (No. 81) of the old court of chancery. The only essential change is in substituting the word "finally" in the Code, for the word "eventually" in the rule, the only effect of which, however, is to give it a broader and intenser signification.

That rule has been long in existence; and it is a little remarkable, and somewhat significant, that no case is to be found in the reports, so far as I have been able to examine, where an

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application for a reference has been made, or acted on under the circumstances which exist here. The application, from the necessary import of the language of the rule, cannot be made at a period in the progress of the suit short of that stage where there shall have been some decision of the court, that the injunction was improvidently granted, and the party obtaining it was not entitled thereto.

There is nothing decided in the case of *Durkin* agt. *Lawrence*, (1 Barb. S. C. Rep. 447,) which conflicts with this conclusion. There the injunction was dissolved upon the motion of the defendant, and after argument, upon the matter of the bill only.

Judge HARRIS, in deciding that case, expressed a doubt at first, whether the true construction of the rule would allow a reference to ascertain damages, until the cause had been finally disposed of upon the merits. But he ultimately came to the conclusion, that when the injunction is dissolved upon the matter of the bill only, it is to be regarded as a final decision that the plaintiff was not equitably entitled to the injunction, and a reference was accordingly ordered.

This concedes the point that there must be some action of the court not only, but that the action must be equivalent to a final decision that the plaintiff had no right originally to the order which he obtained. And this substantially conforms to all the requirements of the 222d section of the Code. The same case, however, recognizes and affirms the doctrine, that if the injunction is dissolved upon bill and answer, the final decision upon the equity of the bill is not deemed to have been made until the final hearing and decision of the cause.

"For although," the judge remarks, "the equity of the bill may be denied in the answer, so as to entitle the defendant to have the injunction dissolved, it may turn out, upon taking the proofs, that the bill was true and the answer false; and in that case it will eventually be decided that the plaintiff was equitably entitled to the injunction."

It may be assumed, that in this cause the complaint presented a case which fully warranted the order of the court, since the defendant made no attempt to dissolve it upon the matter con-

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tained therein; and no different rule, I apprehend, is to be applied, if the injunction has been dissolved upon affidavits, than is held to obtain if the dissolution has been effected through the medium of an answer. It still remains for the court ultimately to decide that the party was not originally entitled to it; and until this point is reached in the progress of the suit, the application for a reference to ascertain damages is premature.

The motion must be denied; but as the question is novel, and the point has never been distinctly passed upon before, it must be without costs of opposing.

SUPREME COURT.

THOMPSON agt. MINFORD & CAMM.

It is often necessary to allow a *narrative* mode of stating all the facts in a complaint constituting the plaintiff's case, as was frequently done in a bill in chancery, and sometimes in an action on the case. For instance, where the original cause of action (work and labor, or a promissory note, &c.) is set forth, and also a judgment obtained thereon in another state.

The Code, in § 172, allows any pleading to be *amended* in all cases, as of course and as a matter of right, within twenty days after the service of the answer or demurrer to such pleading, without any restriction except one, which is specified, viz., unless it should appear to the court that it was done for the purpose of *delay*, and that the opposite party would thereby lose the benefit of a circuit or term for which the cause might be noticed.

In this case the plaintiff, after service of the answer, amended his complaint (under § 172) upon a promissory note, by setting forth both the note and a judgment obtained upon it in another state. The defendant moved to set aside the amended complaint, which was denied.

New-York Special Term, February, 1855.

MOTION to set aside amended complaint.

The affidavits show that a complaint was served Dec. 1, 1854, on a note of the defendants, dated Dec. 28, 1853, at six months: that an answer was put in, showing a recovery, in Pennsylvania,

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of a judgment in favor of the plaintiff against the defendants on the same note, on Sept. 4, 1854: that action being commenced on 13th of July, 1854; that on the sixth of January last the plaintiff amended his complaint, setting forth both the note and the judgment on it, and claiming only the sum demanded in the original complaint. The affidavit of the plaintiff's attorney also shows that he knew nothing of the judgment when the original complaint was served.

— — — — — *for defendants.*
— — — — — *for plaintiff.*

MITCHELL, Justice. Mr. Justice STRONG has shown the history of amendments, as regulated by the rules of the supreme court, in *Hollister agt. Livingston*, (9 How. 140,) that under the rules of 1796, an amendment by adding a new count was not allowed, but that under the rules of 1847, this was expressly allowed; and he was of opinion that amendments could not be made introducing substantially *new causes of action*, although they might be made so as to change the form of the action, according to the old phraseology, as from trover to trespass, or from case to assumpsit, if no new cause of action were introduced. The point which he decided was, that when the plaintiff sued on a sealed note, and the defendant answered, setting up usury, and the plaintiff amended by adding counts showing the original consideration for the note independent of the usury, viz., work and labor, and prior indebtedness, the defendant had waived his objection by retaining the amended complaint sixteen days.

That case shows one instance out of many in which justice requires such amendments to be allowed. The plaintiff had one good cause of action arising out of his dealings with the defendants; but it was uncertain in which of two several forms he should sue for it. If he sued on the note, on which it might be that the defendant could prove some usury, the defendant would plead usury, and bar the whole claim: if he sued on the original consideration, the work, labor and indebtedness prior

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to the usurious contract, the defendant might set forth the sealed note in answer, as a merger of the prior unliquidated demand. To prevent the evil of this kind of management, it is necessary that the plaintiff be allowed to state his whole case—the origin of the first indebtedness, and the securities or evidences of debt subsequently taken for it, claiming still only one payment for the whole—as one only is due.

This is not a new count, but is one count detailing, as was frequently done in a bill in chancery, and sometimes in an action on the case, a narrative of the facts constituting the plaintiff's case instead of the final agreement alone, which, if valid, might have been sufficient alone. The like practice also prevailed even in a plea in some cases, as in setting up a corporate right on *quo warranto*, where a number of laws merely treating of the corporation as existing, and as having certain powers, were pleaded to show the right to those powers—(*People* agt. *Manhattan Co.*),—or various grants from the crown were pleaded in the same manner. (*The King* agt. *Passmore*, 3 T. R. 190.)

The supreme court, after practising from 1796 to 1847, under the more restricted system, found it expedient to adopt the more liberal one, and to allow amendments of course, introducing new counts. Then came the Code—certainly intended to be as liberal as any former practice of the courts, and in § 172, allowed any pleading to be amended within twenty days after the service of the answer or demurrer to such pleading, and without any restriction, except one, which is specified, viz., unless it should appear to the court that it was done for the *purpose of delay*, AND that the opposite party would thereby lose the benefit of a circuit or term for which it might be noticed. This being the only restriction imposed, it may be inferred that it is the only one intended by the legislature.

Other instances have occurred before this court, in which they have found it necessary to allow this narrative mode of stating all the facts—(not the evidence of facts)—in a complaint; as where the original cause of action was set forth, and also a judgment obtained on it in another state; and there was reason to apprehend that the defendant meant, if the statement of the

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judgment were struck out, to set it up in bar, and if it were left in, and the consideration on which it was founded were struck out, then to plead that the court in which the judgment was obtained had not obtained any jurisdiction over the person of the defendant: in such cases the court has refused to strike out either allegation. So in the common pleas, where a plaintiff sued for goods sold, the defendant set up a sale on a credit of six months, Judge DALY allowed an amendment to the complaint, showing the sale on credit, and that it was procured through fraudulent representations. (6 *How. Pr. R.* 390.) That was an application to the discretion of the court under § 173, when the *court* alone could allow the amendment, and then only if it did not change substantially the plaintiff's claim: and he held that it did not substantially change the *claim*, which was for the price of the goods: although it did (in his opinion) change the cause of action.

Justice WELLES, in *Field* agt. *Morse*, held, that a plaintiff was regular who, having served a complaint on contract, with allegations that the debt was fraudulently contracted, afterwards amended the complaint by striking out the allegations of fraud. (8 *How. Pr. R.* 47.) He says, it is not allowable to a party to *substitute* a *new* and *different* cause of action, but he may change the manner of stating the same, may leave out redundant or irrelevant matter, or *add facts* in support of the cause of action stated in the original pleading. (p. 48.) In this case, this plaintiff does not strictly *substitute* a new and different cause of action; and he adds facts in support of the action as originally stated—if by the cause of action is intended the original consideration out of which the claim arose—and such perhaps may have been the intention of the learned justice, and would be correct in an untechnical sense.

Some statements were made on both sides at the argument, which do not appear in the papers submitted, and the motion is decided as the counsel desired, on the papers only. It was said that the defendants' goods had been attached and then discharged on their giving security; that they were insolvent, and had made an assignment for the benefit of their creditors; and

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that this was an attempt of one creditor to obtain a preference. However these matters might influence a judge who had a plenary discretion, some for the one party, and some for the other, they could not affect this motion; as under this section the plaintiff has an absolute right to amend in all cases in which it gives him the right, and the right does not depend on any leave from the court. The court can only say whether the amendment is within the meaning of that section, and not whether it is discreet to allow it under peculiar circumstances not provided for in that section. Nor can the court, *if* this section allows the amendment, refuse it because the sureties of the defendant might become liable under the amendment, and might escape if it were not made: they become sureties subject to the risk of all lawful amendments.

The motion to set aside the amended complaint is denied without costs.

SUPREME COURT.

EDWIN H. ALLEN agt. HENRIETTA ALLEN and others.

In an action for *partition*, in which the plaintiff is obliged to make "*unknown owners*" defendants, he is entitled to proceed by *publication* under § 135 of the Code, where a proper designation of those parties are given.

Columbia Special Term, October, 1854.

MOTION for order of publication, &c.

This action was brought for the partition of lands. The plaintiff's affidavit shows that three of the defendants reside in New Gascony, in the state of Arkansas; that the defendant Thomas Allen, being a soldier in the army of the United States, left this state about *twenty-five years* ago, and has not been heard from for more than twenty years; that when he was last heard from he was stationed at Council Bluffs, in the state of

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Missouri; that when he left he had a wife and children, who went with him, and whose names the plaintiff is unable to state. The defendants in the action are the three persons residing in the state of Arkansas, and "Thomas Allen, his wife and children, and others, owners unknown." Upon this state of facts, the plaintiff moved for an order, that service of the summons be made by publication.

DARIUS PECK, for plaintiff.

HARRIS, Justice. When this application was presented, I had great doubts whether it could be brought within the provisions of the Code. But, upon further consideration, I am satisfied that the plaintiff is entitled to the usual order authorized by the 135th section.

Besides the three who reside in Arkansas, the other defendants are really "unknown owners." Thomas Allen has not been heard from in more than twenty years, and is probably dead. Who the persons are who have succeeded to his interest in the lands, the plaintiff has been unable to ascertain. It was very well, instead of proceeding against "unknown owners" merely, in respect to the interest which would have belonged to Thomas Allen, if living, to state that the proceeding was against "Thomas Allen and his wife and children, and others, owners unknown." But, in effect, it is a proceeding against "unknown owners."

The question, therefore, is, whether, in an action for partition, in which the plaintiff is obliged to make unknown owners defendants, he is to proceed against them in the manner prescribed by the 135th section of the Code, or, regarding the case as one not provided for by that act, is to pursue the practice as it existed at the time of the adoption of the Code.

By the 175th section of the Code it is provided, that "when the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated by any name." Here the plaintiff, being thus ignorant, has designated the persons who are proper parties defendant in the action, as "Thomas Allen and his wife

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and children, and others, owners unknown." This, I suppose, is a sufficient designation. It indicates as clearly as possible who are the parties intended.

It also appears that the persons thus intended have an interest in the subject of the action, and thus the case is brought within the 4th subdivision of the 135th section.

An order must, therefore, be entered, directing that service of the summons in this action be made upon all the defendants therein, by the publication thereof in the Albany Evening Journal and the Democratic Freeman, once in each week, for *twelve weeks*, and also that a copy of the summons and complaint be forthwith deposited in the post-office at Hudson, directed to each of the defendants residing in Arkansas.

SUPREME COURT.

GEORGE S. DREW agt. MICHAEL DUNCAN.

Where the purchaser of a house and lot entered into a written contract with the vendor to pay down \$300, and to pay \$200 more in four days thereafter, and the balance on the delivery of the deed, and the purchaser paid the \$300 down, but neglected to pay any further sum for several months, when the vendor contracted with another person for the sale, and put him in possession of the premises,

Held, that the vendor was entitled to an order *cancelling the contract* with the first purchaser, notwithstanding the latter stated his willingness then to comply with the contract. He had failed to make his payments in *time*, and was not thereby entitled to a *specific performance* of the contract, consequently the converse of the proposition was true, and the vendor was entitled to relief.

New-York Special Term, 1854.

THIS controversy arises out of a contract made on the 30th of April, 1853, for the sale and purchase of a house in Lexington avenue. Three hundred dollars of the purchase money, it appears, was paid down: two hundred more was *to be paid* four days after, on the 3d of May, and the balance, say fifteen hun-

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dred, on the delivery of the deed : it being understood that the premises were, and were to remain, subject to a mortgage of six thousand dollars.

BUSTEED & WILSON, *for plaintiff.*

MALCOLM CAMPBELL, *for defendant.*

ROOSEVELT, Justice. The house, it was stipulated, was "to be finished complete;" and the proof shows that it was so in a few days after the contract was signed. Still, the purchaser did not make, nor offer to make, the second, and of course not the last, payment. He seems to have relied upon the assumed doctrine—unfortunately too prevalent—that "time is never of the essence of a contract," and to have treated as a dead letter the express stipulation, that the deed was only to be given "on receiving payment *at the time and in the manner above mentioned.*" The vendor, however, viewing the matter in a different light, after waiting several months, selected another purchaser; and having made with him a contract, and delivered to him possession, now asks that the record of the agreement previously entered into and not complied with, may be cancelled; and that the cloud upon his title, which that record creates, and in consequence of which part of the consideration is withheld, may be removed.

To which of the purchasers, then—for that is, in effect, the question—ought the title of this house to be given? to the one in possession, who *has* fulfilled, and stands *ready to fulfill* to the letter, or to the one out of possession, who neglected to pay at the time stipulated, and who, although talking of his *willingness*, does not even now offer to bring the money into court.

It seems to me perfectly clear, under the circumstances, that the defendant is *not* entitled to a specific performance, and, as the legitimate converse of the proposition, that the plaintiff is entitled to relief. Should the defendant, notwithstanding his default, deem himself entitled to recover back the \$300, he may test that question by a suit for damages. The *record* of the contract is not necessary for that purpose, and its cancel-

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ment will not prejudice his claim, if otherwise well founded. I do not wish, however, in this remark, to be considered as giving any encouragement to such a suit. In my view of the law, a person selling real estate has the same right to make punctuality in time, as he has sufficiency in amount, a condition precedent; and that it is as much "the duty of the courts," as the Revised Statutes express it, (1 R. S. 748,) "to carry into effect the intent of the parties," in one respect, as in the other. There is a most essential difference—although the two things have sometimes been confounded—between relieving against the forfeiture of a right already vested, and dispensing with the conditions of a right which, without such conditions, had never accrued. The former is an exercise of the necessary jurisdiction of a court of equity, the latter, a mere assumption of arbitrary, and, in my view of the statute, of prohibited power.

A decree must, therefore, be entered, directing the record of the first contract to be cancelled; and also awarding costs and an extra allowance to the plaintiff, unless the defendants stipulate not to bring an action for damages to recover back the instalment of \$300 paid on signing the papers.

SUPREME COURT.

MARTHA JANE DUNNING agt. WARREN THOMAS.

The theory of the Code in reference to pleading is, that the party pleading knows, or should know, beforehand, what is the truth of his case, and that he should state the truth, and nothing but the truth, in his pleading.

The statement of the case in different forms, for the purpose of guarding against a variance between the allegation and the proof, is no longer necessary. If there is any variance between the allegations and the proofs in any of the details of the case, the party will, upon the trial, be allowed to amend, so as to adapt his pleading to his case as proved, upon such terms as may be just—provided no new cause of action is stated.

It is impossible, in the nature of the case, that there can be four distinct causes of action in an action for breach of promise of marriage.

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And where the complaint in such action stated, *first*, a promise by the defendant to marry the plaintiff upon request; *second*, generally, a promise to marry the plaintiff; *third*, a promise to marry in a reasonable time; and, *fourth*, a promise to marry when the defendant should be disengaged from another, *Held*, that each of these promises was to be regarded as but a reiteration of the first, only varied in its terms. The complaint was set aside, with costs, with liberty to amend.

Albany Special Term, March, 1855.

MOTION to strike out complaint, &c.

The action was brought to recover damages for a breach of promise of marriage. Four causes of action are stated in the complaint. The *first* count states a promise by the defendant to marry the plaintiff when he should be requested so to do. The *second* count states generally a promise to marry. The *third* count states a promise to marry in a reasonable time. The *fourth* count states a promise to marry the plaintiff when the defendant should obtain a release, or discharge from an obligation he was under to marry one Mary Ann Waring, and that he had obtained such release or discharge. In *each* count it is stated that, after making the promise alleged, the defendant had married another person.

The defendant moved to set aside the complaint, or that the plaintiff be required to elect upon which one of the four counts in the complaint she would rely.

In opposition to the motion, the plaintiff's counsel produced an affidavit, stating that each of the promises, stated in the several counts of the complaint, had been made by the plaintiff.

J. W. CULVER, *for plaintiff.*

GEO. G. SCOTT, *for defendant.*

HARRIS, Justice. It is required of the plaintiff, in every action, that he state the facts which constitute his cause of action in a plain and concise manner, and without unnecessary repetition. In some cases, several causes of action may be united in the same complaint. But the plaintiff is no longer authorized

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to state the same cause of action in different counts, with variations adapted to every possible state of facts which may be developed upon the trial.

The theory of the Code is, that the party pleading knows, or should know, beforehand, what is the truth of his case, and that he should state the truth, and nothing but the truth, in his pleading. The statement of the case in different forms, for the purpose of guarding against a variance between the allegation and the proof, is no longer necessary. The court that tries the issue is now vested with power to allow an amendment of the pleadings whenever the ends of justice require it.

The only restriction upon this power to amend upon the trial is, that the party shall not be allowed to change his pleading to such an extent as to make it present a new cause of action, or ground of defence. If, therefore, a party is able to state truly the substance of his case, when pleading,—(and no one will pretend that he ought to attempt to plead until he is thus able,)—he need not fear defeat on account of any variance between the allegations and proofs in any of the details of the case. He will, upon the trial, be allowed to adapt his pleading to his case as proved, upon such terms as may be just.

The great characteristic of the system of pleading adopted in the Code is, that it is strictly enjoined upon the pleader that he shall state facts, and nothing but facts. It is as much a violation of this requirement to state several causes of action, when but one exists, as to state any other fictitious or imaginary case. The strict application of this principle may sometimes be inconvenient, but the inconvenience is far less than that which resulted from the practice of stating a single cause of action, in different forms, under the pretence that the plaintiff had, in fact, several distinct and different causes of action, to each of which the defendant was obliged to plead, and against each of which he was obliged to be prepared to defend himself. After the plaintiff has stated one cause of action, he ought not to be allowed to proceed to state a "*further cause of action*," when he really has none, any more than he should be permitted to make any other allegation which he knows to be *false*. (See

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Stockbridge Iron Co. agt. Mellen, 5 How. 439; Churchill agt. Churchill, 9 How. 552; Lackay agt. Vanderbilt, 10 How. 155.)

The application of these principles is fatal to the complaint in this case. From the very nature of the case, it is impossible that the plaintiff can have four subsisting causes of action for the breach of a promise of marriage against the same defendant. It is true, that the defendant may have made all the promises set forth in the complaint. But if so, each promise, after the first, was but a modification of the contract which preceded it, and not a new and independent contract. It is like the case of a building contract, which, after the contract has been made, is modified from time to time by a change in the details of the work. No pleader, in an action upon such a contract, would think of counting upon the original agreement and the subsequent modifications as so many distinct and independent contracts. If at one time the defendant agreed to marry the plaintiff upon request, and, at another time, within a reasonable time, and again, when he should be released from a prior engagement, each of these promises is to be regarded as but a reiteration of the first, only varied in its terms. The last promise made and assented to by the plaintiff, would be the only subsisting contract between the parties, for the breach of which an action could be maintained.

This complaint, therefore, must be set aside, with costs; but with liberty to the plaintiff to serve an amended complaint within twenty days after the notice of this decision.

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SUPREME COURT

THOMAS C. TAYLOR agt. DAVID R. HARLOW and SANFORD A.
PIERSON.

A party is not entitled to a *new trial* on the ground of *surprise*, because the opposite party and his counsel, on the trial, led him to believe that certain facts material to the defence would be admitted, or not disputed; and by reason thereof he did not introduce any evidence upon such facts.

So long as the conduct of the opposite party and his counsel, in the matter, is free from fraud or positive stipulation, it forms no ground for a new trial, although it might have misled. It is a course the party, misled, volunteered to pursue. Under the Code, as it now reads, a judge at the circuit has no authority for sending a cause on a *case* to the general term *before judgment*.

There are but two instances where a cause tried before a jury can be taken to the general term before judgment: *First*, Where *exceptions* are taken, the judge may, at the trial, direct them to be heard, in the first instance, at a general term, and judgment must there be given. *Second*, Where, upon the trial, the case presents only questions of *law*, the judge may direct a verdict subject to the opinion of the court at general term, where application for judgment must be made.

In all other cases, judgment must be entered in conformity to the verdict at the circuit, on the direction of a single judge. (*Code*, § 264.)

And *motions for a new trial*, on a case or exceptions, or otherwise, must, except as above stated, in the first instance, be heard and decided at the circuit, or special term. (*Code*, § 265.)

Saratoga Special Term, June, 1855.

MOTION for a new trial.

This action was brought to trial before a jury at a circuit court held in Saratoga county in June, 1852, and a verdict ordered for plaintiff, subject to the opinion of the court on a case—cause to be argued and application for judgment to be made, in the first instance, at general term. A case was made and the cause argued before the general term, where judgment was pronounced for the plaintiff. The defendants, upon the case, and upon affidavits, now move for a new trial.

GEORGE G. SCOTT, *for motion*.

C. S. LESTER, *opposed*.

JAMES, Justice. In actions tried before a jury, motions for a new trial, when not made before the judge holding the circuit, must be heard upon a case or exceptions, except for irregularity, surprise, or newly-discovered evidence. (*Code*, §§ 264, 265.) This motion is founded upon both a case and affidavits. The motion is presented in two aspects. *First*, a new trial is asked on the ground of surprise; and, *second*, because the action is in such a position that the defendants cannot take it to the court of appeals.

Under the first head, it is claimed that the conduct of the plaintiff and his counsel on the trial was such as to mislead the defendants in their defence, and prevent them from introducing evidence fully to prove and establish it, by inducing them to believe that certain facts, upon which the case ultimately turned, were not to be denied or disputed. Such circumstance, if true, affords no ground for a new trial. A party is not unfrequently misled, by the conduct of his opponent or counsel, during the progress of a cause; and so long as the same is free from fraud or positive stipulation, I am not aware of its ever having been made a ground for a new trial.

In the case of *Beekman agt. Bemus*, (7 Cow. 29,) after the plaintiff had rested his cause, the defendant's counsel called a witness to the stand and had him sworn, but on an intimation from the court favorable to the defendant, the counsel forbore to examine the witness or introduce further testimony, although urged by his client to go on with the proofs. The jury found for the plaintiff. It was held that this was no ground for a new trial. No testimony had been excluded by the judge; and when the counsel consented to be satisfied with the impressions of the judge upon questions of fact, instead of the verdict of the jury, he assumed the responsibility of a decision in his favor, and disappointment in the result affords no ground for a new trial. So in this case: if the defendants chose to rest the proof of the facts of their case upon the conduct of the plaintiff or his counsel, instead of upon actual testimony, or open admission; or if, from plaintiff's conduct, the defendants were led to sup-

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pose the plaintiff had not, nor would not, discover the weak points in their case, an adverse result furnishes no ground for a new trial. The testimony was known, and the witness in court: their course was taken after due deliberation; and the defendants must abide the consequence of their omission.

Under the second head the defendants insist that a new trial should be granted, because the action is now in a position where it cannot be taken to the court of appeals, that court having determined that it will not review exceptions taken to the decisions of this court made at general term; (2 *Com.* 98, 189; 4 *Selden*, 133;) and the defendants ask favorable consideration, as, they allege, they were misled in the practice, and prevented from taking exceptions on the trial, by the direction of the court in ordering a case to be made, and sending the cause to the general term for judgment.

Under the Code, as it now reads, the judge at circuit has no warrant for sending a cause on a case to the general term before judgment. There are but two instances where a cause tried before a jury can be taken to the general term before judgment. In those instances the general term may pronounce judgment in the first instance, from which appeals may be taken to the court of appeals upon exceptions to such determination, (*Code*, §§ 265, 333, 11,) and this, too, without in any wise conflicting with the cases in 2 *Com.* and 4 *Selden* above cited. Those cases both arose before the amendments of 1851 and 1852 to the Code, and when there was no authority for entering judgment, in the first instance, upon an order of the general term.

The instances where such judgment may now be entered are, *first*, "where exceptions are taken, the judge trying the cause may, at the trial, direct them to be heard, in the first instance, at a general term, and judgment in the meantime suspended; and in that case they must be there heard in the first instance, and judgment there given." (*Code*, § 265.) *Second*, "where, upon the trial, the case presents only questions of law, the judge may direct a verdict subject to the opinion of the court at a general term, and in that case the application for judgment

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must be made at the general term." (*Code*, § 265.) In all other cases, judgment must be entered in conformity to the verdict at the circuit, on the direction of a single judge; (*Code*, 264;) and motions for a new trial on a case, or exceptions or otherwise, must, except as above stated, in the first instance, be heard and decided at the circuit or special term; (*Code*, § 265;) from which, after judgment, an appeal may be taken to the general term. (*Code*, § 348.)

Under the amendments of 1851 to the Code, "motions for a new trial on a case, bill of exceptions, &c., might, by an order from the judge holding the circuit, be heard, in the first instance, at general term. As this action was tried very soon after the amendments of 1852 went into effect, it may be that the change of practice in this respect had escaped the attention of the judge holding the circuit, and that he intended the court at general term should pass upon all the questions made by the case; but from the order made at the circuit, and the affidavits used on this motion, I am convinced that, on the trial, the case presented only questions of law, arising upon the validity, effect and extent of the receipt put in evidence by the defendants. If so, it was a case which might be sent direct to the general term, where judgment might be pronounced in the first instance, and from which exceptions might be taken, and the cause carried to the court of appeals.

The defendants' embarrassment has arisen from the manner in which the case was made up and settled—presenting questions of fact as well as law. Such a case, I think I have shown, could not be sent to the general term for judgment in the first instance. And I am quite certain that, sitting at special term, I ought not to review the adjudication of the general term, even upon a case not properly before it, but which has been there heard without objection from either party.

For this reason the motion must be denied.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW-YORK, upon the complaint
of JOHN E. VASSAR, agt. PHILLIP BERBERRICH.

THE SAME, upon the complaint of JOHN MATTHEWS, agt. THOS.
TOYNBEE.

So much of the *first* section of the act of the 9th April, 1855, entitled "AN ACT FOR THE PREVENTION OF INTEMPERANCE, PAUPERISM, AND CRIME," as declares that *intoxicating liquor shall not be sold, or kept for sale, or with intent to be sold*, except by the persons, and for the special uses, mentioned in the act,—

So much of sections *six, seven, ten, and twelve*, as provide for its seizure, forfeiture, and destruction,—

So much of section *sixteen* as declares that *no person shall maintain an action to recover the value of any liquor sold or kept by him which shall be purchased, taken, detained, or injured*, unless he can prove that the same was sold according to the provisions of the act, or was lawfully kept and owned by him,—

So much of section *seventeen* as declares that, *upon the trial of any complaint under the act, proof of delivery shall be proof of sale, and proof of sale shall be sufficient to sustain an averment of unlawful sale*,—

And so much of section *twenty-five* as declares that *intoxicating liquor, kept in violation of any of the provisions of the act, shall be deemed to be a public nuisance*,—held, to be repugnant to the provisions of the constitution for the protection of liberty and property, and *absolutely void*.

The legitimate authority of the legislature does not extend to the enactment of laws prohibitory of the common and ordinary use of *property*. Nor can it, in the execution of the trusts confided to it, declare, by statute, an article or thing, the product of human industry, or creation of human skill, long recognized as *property*, and of all but universal use, and perfectly inoffensive in itself, to be a *public nuisance*, and thus authorize and justify its destruction. The *protection* given to *property*, as well by the sense of mankind as by positive enactment, makes no distinction as to its greater or less utility. It extends to whatever has been held and enjoyed as such by custom and usages of the country. No power is given to any man or body of men to discriminate.

The *right of property* not only extends to its *corpus*, but to its *ordinary and essential characteristics*, of which the right of *sale* is one; and it can be controlled only so far as to prevent its abuse, without destroying such characteristics.

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An act of the legislature is not the "*due process of law*" mentioned in the 6th article of the constitution of this state. Those words cannot mean less than "*a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property.*" In other words, a man cannot be legislated out of his life, liberty, or property.

A complaint under this act must aver that the liquors alleged to have been sold *were not liquors, the right to sell which, in this state, is given by any law or treaty of the United States.* It does not cure the difficulty that the defendant is charged with having sold liquors contrary to the form of the statute. That will not aid a defective description of the offence. Nor can the defect be cured by evidence. The evidence must be confined to the charge, and the accused cannot be required to answer any complaint, except that which sets out an offence conformably to the rules of law.

The complaint is a substitute for an indictment, so far as it relates to substance, and requires at least as much particularity.

The true way of reading the qualifying clause of the first section of the act, is as a *prohibition of the sale of intoxicating liquors not vendible beyond state legislation, in their existing condition, according to the decisions of the Supreme Court of the United States.*

The provisions of the act relative to the trials under it, indicate an intent to confine them to the *special sessions.* And the enactment, so far as it relates to compulsory trials in the courts of special sessions, is *unconstitutional and void.*

Second District, Brooklyn General Term, July, 1855.

BROWN, S. B. STRONG, and ROCKWELL, Justices.

The act entitled "*An Act for the Prevention of Intemperance, Pauperism, and Crime,*" passed April 9th, 1855,—(sometimes called the Maine law,)—as taken from the statute, is as follows:—

The People of the State of New-York, represented in Senate and Assembly, do enact as follows:—

§ 1. Intoxicating liquor, except as hereinafter provided, shall not be sold, or kept for sale, or with intent to be sold, by any person, for himself or any other person, in any place whatsoever; nor shall it be given away, (except as a medicine, by physicians pursuing the practice of medicine as a business, or for sacramental purposes,) nor be kept with intent to be given away, in any place whatsoever, except in a dwelling-house in

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which, or in any part of which, no tavern, store, grocery, shop, boarding or victualing-house, or a room for gambling, dancing, or other public amusement or recreation, of any kind is kept; nor shall it be kept or deposited in any place whatsoever, except in such dwelling-house, as above described, or in a church, or place of worship, for sacramental purposes, or in a place where either some chemical, or mechanical, or medicinal art, requiring the use of liquor, is carried on as a regular branch of business, or while in actual transportation from one place to another, or stored in a warehouse prior to its reaching the place of its destination. This section shall not apply to liquor, the right to sell which, in this state, is given by any law or treaty of the United States.

§ 2. Any citizen of good moral character, who is an elector of the town or city where he intends to sell intoxicating liquor, as hereinafter provided, and who is not a pedlar, nor the keeper of or interested in any boarding or victualing-house, grocery or fruit-store, or any bar-room, confectionary, inn, tavern, or other place of public entertainment, or the keeper of, or interested in any museum, theatre or other place of public amusement, nor the captain, commandant, agent, clerk or servant of or on any vessel, boat or water craft of any kind whatever, may keep for sale, and may sell intoxicating liquor and alcohol, for mechanical, chemical or medicinal purposes, and wine for sacramental use; provided he shall, within one year previous, have filed in the office of the clerk of the county in which such liquor is to be sold, an undertaking executed by himself and two good and sufficient sureties, to be approved by the county judge of the said county, or in the city of New-York, by one of the judges of the common pleas, and acknowledged before said judge, that he will not violate any provision of this act, and will pay all fines, damages and costs which may be imposed upon or recovered against him, in any action, civil or criminal, to be commenced under any of the provisions of this act; and provided, further, that he shall also have filed, with his undertaking or declaration, an oath or affirmation, taken before said judge, setting forth the town or ward, and particularly designating and

describing the premises and place in which he intends to sell such liquor, and declaring that he is an elector of such town or ward, and does not use intoxicating liquor as a beverage, and is not, and during the time he shall sell such liquor, will not be a pedlar, nor the keeper of, nor interested in any inn, tavern, boarding-house, victualling-house, grocery or fruit-store, bar-room, confectionary, or other place of public entertainment, nor the keeper of, nor interested in any theatre, museum or other place of public amusement, or the captain, commander, agent, clerk or servant of or on any vessel, boat or water craft of any kind whatever, and will not violate any provision of this act; and provided, further, that he shall, within one year previous, have filed a copy of such undertaking and declaration, certified by the county clerk, in the office of the clerk of the town or city in which such liquor is to be sold. No such undertaking shall be approved by any such judge, unless the applicant shall be a man of good moral character, and such sureties shall be householders within such county, and shall severally justify in the sum of five hundred dollars each, over and above all debts, demands, liabilities or legal exemptions, and shall also make oath or affirmation that they have not become possessed of any property for the purpose of enabling them to justify as such sureties, and that they are not and will not become directly or indirectly engaged or interested in the manufacture or sale of intoxicating liquor during the continuance of their suretyship.

§ 3. Any person authorized as in the last section provided, shall not do anything contrary to his said undertaking, nor to what he has sworn in his said oath or affirmation, nor shall he sell any liquor known by him to be impure or adulterated; nor shall he suffer any liquor sold by him to be drunk upon the premises where the same is sold; but he may sell in the following cases and no other:—

1. To any person of the age of twenty-one years, being of good character for sobriety, provided the person selling the same shall have good reason to believe, and shall believe, that the same is intended by the purchaser to be used for some one

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of the purposes in the preceding section named, and not to be sold, disposed of, or given away, or to be drank on the premises, contrary to the provisions of this act; or,

2. To any person authorized to sell such liquor as in the last section provided.

Every person authorized to sell as in the last section provided, shall keep a book of sales, in which he shall enter or cause to be entered every sale made by him, which entry shall contain the kind, quantity, price, purpose for which, name of the person to whom, and time when sold; which book shall, at all times during business hours, be open to public examination by any resident of the town or city. Every person so selling liquor shall file with the clerk of the town or city where he sells the same, between the first and fifteenth day of each month, a sworn copy of such sales, and of all purchases made by him, containing kind, quantity and price, with an affidavit that the same contains a correct account of the sales, and all the sales and purchases made by him during the previous month, according to his best knowledge, information and belief. But nothing in this act contained shall be construed to prevent the sale by legal process (in case of the insolvency of the authorized liquor seller) of any liquors held by him at the time of such insolvency, to any other liquor seller authorized to sell by this act, nor to prevent the legal representatives of any deceased person, (who, at the time of his decease, was an authorized liquor seller,) from selling any such liquors as may come to their possession as property of such deceased liquor seller, to any person authorized by this act to sell liquor.

§ 4. Every person who shall violate any provision of either of the preceding sections, shall, upon conviction, be adjudged guilty of a misdemeanor; and, except for failure to file his return or make his entries, as in the last section provided, shall forfeit all the liquor kept by him in violation of either of the preceding sections, and be punished as follows:—For any violation of section first, for the first offence, by a fine of fifty dollars; for the second offence, by a fine of one hundred dollars and thirty days imprisonment; for the third, and every

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subsequent offence, by a fine of not less than one hundred nor more than two hundred and fifty dollars, and by imprisonment not less than three nor more than six months. For any violation of section second or third, by a fine of one hundred dollars, and by imprisonment in the county jail not less than thirty days, and be ever thereafter disqualified for selling liquor within this state. Upon every conviction, the defendant shall also be required to pay all costs and fees, as provided in this act. In default of payment of any such fine, costs and fees, or any part thereof, the defendant shall be committed until the same are paid, not less than one day per dollar of the amount unpaid. If any person purchasing any liquor as in the last section provided, shall, at the time, make any false statement concerning the use to which such liquor is to be applied, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall forfeit and pay a fine of ten dollars and costs, as provided in this act, and stand committed until paid, not less than one day per dollar of the amount unpaid.

§ 5. Every justice of the peace, police justice, county judge, city judge, and in addition, in the city of New-York, the recorder, each justice of the marine court, and the justices of the district courts, and in all cities where there is a recorder's court, the recorder, shall have power to issue process, to hear and determine charges, and punish for all offences arising under any of the provisions of this act; and they are each hereby authorized and required to hold courts of special sessions for the trial of such offences, and under this act to do all other acts, and exercise the same authority that may be done or exercised by justices of the peace in criminal cases, and by courts of special sessions, as the same are now constituted; and the term magistrate, as used in this act, shall be deemed to refer to and include each officer named in this section. Such court of special sessions shall not be required to take the examination of any person brought before it upon charge of an offence under this act, but shall proceed to trial as soon thereafter as the complainant can be notified; and for good cause shown, he may adjourn from time to time not exceeding twenty days. At the

time of joining issue, and not after, either party may demand trial by jury, in which case the magistrate shall issue a venire, and cause a jury to be summoned and impaneled, as in other criminal cases in courts of special sessions. The complainant may appear upon such trial upon behalf of the people, and prosecute the same with or without counsel. He may also prosecute the same in all the courts to which, as hereinafter provided, appeal may be taken by attorney, or he may apply to the district attorney, whose duty it shall be, upon such application, to appear and conduct said appeal from the judgment thereon. The same costs and disbursements shall be allowed against the defendant upon such appeal as are now allowed in civil actions in those courts to which appeal may be taken according to the provisions of this act. In all cases, if the district attorney shall appear and conduct the trial or appeal, or both, the costs, if any, shall go to him for his individual use, in other cases to the complainant; and in default of the payment of the whole or any part thereof, the defendant may be committed to the same extent as provided in the fourth section of this act.

§ 6. Whenever complaint on oath or affirmation shall be made in writing to any magistrate by one or more credible persons, resident of the county where the complaint is made, or of an adjoining county, that he or they have reason to believe, and do believe, that intoxicating liquor is kept or deposited in violation of any provision of section first of this act, whether the person so keeping or depositing the same is or is not known to the complainant, in some specified place or places within the city or town within which such complaint is made, or upon any water adjacent thereto, or within five hundred yards of the boundaries thereof, which complaint shall state the facts and circumstances upon which such belief is founded, or such facts and circumstances shall be stated upon oath or affirmation of some other person, it shall be the duty of such magistrate, if he is satisfied that there is probable cause for said belief, forthwith to issue a warrant, directed in the same manner as criminal processes a renew directed, commanding the officer, with proper

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assistance, forthwith diligently to search such place or places, and to seize all intoxicating liquor found therein, which, from said complaint or other proof furnished, said magistrate shall be satisfied there is probable cause for believing is kept or deposited in violation of any provision of section first, together with the vessels in which the same is contained, and to store the same in some safe and convenient place, to be disposed of as hereinafter provided. If from such complaint or proof, or both, the person so keeping or depositing said liquor shall be made known, or ascertained to the satisfaction of said magistrate, he shall issue a separate warrant for the arrest of such person, to be dealt with according to the provisions of this act. But no warrant shall be issued under this act, to search any such dwelling-house as is described in section first of this act, unless the occupant thereof shall have been convicted, as hereinbefore provided, of having sold intoxicating liquor in his dwelling-house, or suffered it to be done, within one year next preceding the issuing thereof. Every warrant so issued shall particularly describe the place to be searched, and the things to be seized.

§ 7. Whenever any liquor shall be seized under any provision of this act, it shall be the duty of the officer by whom such seizure is made, except in cases where the owner thereof shall have been arrested, forthwith to give written notice to the owner or his agent, if known, of the seizure of such liquors, which, and the vessels containing the same, shall be described in such notice, as near as may be, and of the name of the magistrate by whom the warrant was issued; or in case of seizure under section twelfth, before whom the person arrested was carried, and the name and residence of such officer making such seizure, and the time of such seizure. Such notice shall be served by delivering it to the owner or his agent, personally, or by leaving the same at his last or usual place of residence, with a person of mature age residing on the premises. If the owner or his agent cannot be found, and his place of residence is not known to the officer, such notice shall be served by delivering the same to any person of mature age, residing, or being employed

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in the place in which such liquor was contained, or, if none such can be found, by posting the same in a conspicuous place upon the outer door of such place, and copies of such notice, containing also a description of the place in which such liquor was found, shall forthwith be conspicuously posted in at least three public places within said city or town. Any person may, at any time before forfeiture, present to the magistrate named in such notice, an affidavit or affirmation in writing, stating that such liquor, at the time of such seizure, was actually owned by him, or by some other person named by him, for whom he is agent; that he or such person had not become possessed thereof for the purpose of preventing its forfeiture, and that the same had not been kept contrary to the provisions of this act, to the best of his knowledge and belief, and also specifying the purpose for which, the place where, under which exception of section first the same was kept, and the facts particularly showing it to be within the exception; and thereupon the same proceedings before said magistrate, shall in all respects be had, as are provided in section fifth. Upon the trial of such claim, the custom-house certificates of importation, and proofs of marks on the casks or packages, corresponding thereto, shall not be received as sufficient evidence that the liquors contained in said casks or packages are those actually imported therein. The magistrate shall keep minutes of the proceedings, testimony and judgment upon all trials under this or section fifth, which shall be subscribed by him. He shall have power to issue process to compel the attendance of witnesses, and to punish for non-attendance as witnesses or jurors, in the same manner as in civil actions before justices of the peace.

§ 8. Either the complainant or other person prosecuting in behalf of the people, or defendant, may appeal to the supreme court at general term, from any judgment of any magistrate rendered under any provision of this act, by serving upon such magistrate, and the complainant or such other person, or the defendant, as the case may be, written notice thereof, specifying the grounds of appeal, within ten days after the rendering of such judgment, the service to be made as now provided in

appeals from justices' courts in civil actions. The decision of the supreme court shall be final, unless with the decision one of the judges thereof shall file a certificate that a legal question is involved therein, upon which it is proper to take the opinion of the court of appeals,—in which case an appeal may be taken to the court of appeals. The service of such notice shall be of no effect in behalf of the defendant or complainant, unless he shall at the same time deliver to the magistrate an undertaking to the people of the state of New-York, in the sum of five hundred dollars, with one or more sureties, to be approved by such magistrate or county judge, conditioned that, if the judgment be affirmed on such appeal, or upon a subsequent appeal from the decision of the supreme court to the court of appeals, they will pay the amount of the fine and costs contained in such judgment, and that the defendant shall not, during the pendency of said appeal, violate any provision of this act, and that they will jointly and severally pay all fines, damages and costs which may be against him, in consequence of any such violation: and in case such defendant shall be required by such judgment to be imprisoned, or to stand committed, with the further condition that he will appear in the court of general sessions of said county, at the term thereof, next after the affirmance of such judgment, and not depart therefrom without leave and by the order of such court of general sessions, as to such imprisonment or commitment. Upon the giving of such notice and undertaking, all further proceedings upon such judgment shall be stayed, until such appeal shall have been decided, or dismissed for want of prosecution, as hereinafter provided. No proceeding or judgment had or rendered under any provision of this act, shall be set aside or be void by reason of any technical errors or defects not affecting the merits; but the same may be amended without notice before or after judgment, or upon appeal or review, or after judgment rendered upon appeal or review, when by such amendment substantial justice will be promoted. Any judgment or verdict rendered under any provision of this act against evidence may be reversed upon appeal, as in civil actions. All

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appeals from judgments under this act, shall have the same precedence as other criminal causes, and may be moved out of their order at any time by either party.

§ 9. Whenever any appeal shall be taken according to the provisions of the last section, it shall be the duty of the magistrate, within ten days thereafter, to file a return of the testimony and proceedings had before him upon the trial of such action, together with the notice of appeal and undertaking, if any, and his certificate that the same contains all the testimony and proceedings had before him on such trial, in the office of the county clerk of the county in which the trial was had. After the filing of the papers as aforesaid, the same rules and proceedings shall in all respects govern the appeal to the final determination thereof, and as to amending the return of said magistrate, as are now provided in civil actions, except as hereinbefore modified: provided, nevertheless, if either the complainant or defendant cannot be found, to be served with notice as now provided, the same may be served by filing it with the county clerk, and attaching thereunto an affidavit containing the reasons for so doing. If the complainant, other than some one of the officers whose duty it is made to enter complaint, shall fail to appear and defend or prosecute any appeal brought under any provision of this act, or to apply to the district attorney as provided in section fifth, he shall be personally liable to the defendant for the costs of said defendant, to be recovered in a civil action. All executions issued upon the final determination of any appeal adversely to the defendant, to collect the judgment thereon, shall be in the name of the people of the state of New-York against the property and person. If any execution so issued shall be returned unsatisfied, in whole or in part, the district attorney may, and he hereby is authorized to bring an action upon such undertaking, in the name of the people of the state of New-York, and recover therein the amount of such judgment and costs.

§ 10. Whenever any liquor seized under any provision of this act, shall not be adjudged forfeited, the officer having the same in custody shall return it to the place where it was seized;

but when it shall be adjudged forfeited, as provided in any section of this act, or whenever any trial shall have resulted adversely to the defendant, and the time for serving notice of appeal shall have elapsed, and no notice and undertaking shall have been served, or the judgment appealed from shall have been finally decided adversely to the defendant, and notice thereof given to the magistrate before whom the trial was had, it shall be the duty of said magistrate forthwith to issue a warrant commanding that the liquor so seized and forfeited be destroyed. And the officer to whom the same shall be delivered, shall forthwith proceed, in the presence of one of the complainants, or of some other person to be designated in such warrant, and to be summoned by him, to execute the same; and such person shall join with the officer in making return by affidavit, of the time, place and manner of the execution of such warrant; and upon the receipt of said return, said magistrate shall order execution to issue to said officer, who shall proceed to sell the vessels which contained said liquor; and the proceeds of said sale shall be applied in like manner as provided by this act in other cases.

§ 11. Whenever complaint, on oath or affirmation, in writing, (which complaint shall state the facts and circumstances upon which his belief is founded,) shall be made before any magistrate, by any person, that he has just cause to suspect and believe, and does believe, that any offence against any provision of this act has been committed, and that some other person or persons, named by him, has or have knowledge of the commission of such offence, such magistrate, if he thinks there is probable cause to believe that such offence has been committed, and that such person or persons has or have knowledge of the commission of such offence, shall forthwith issue a summons to the person or persons so named, commanding him or them to appear before him, at a place and time not more than four days thereafter, to be designated in such summons, to testify in relation to such complaint. Such summons may be served in the same or in an adjoining county, by any officer to whom the same shall be delivered, or by any other person, by stating the

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contents, or delivering a copy thereof, to the person or persons named therein, and at the same time showing him or them the original. If the person or persons so summoned shall fail to appear, the magistrate, upon proof of the service of said summons by the return of an officer, or the oath of any other person, shall issue an attachment to compel their attendance for the purpose of giving such testimony, which attachment may be executed in any part of the state. The person so attached may, unless some reasonable cause or excuse be shown by his own oath, or the oath of some other person, be punished by a fine of not less than ten dollars, and in default of payment he may be committed to the same extent as provided in the fourth section.

§ 12. It shall be the duty of every sheriff, under-sheriff, deputy-sheriff, constable, marshal, or policeman, to serve all processes to be issued by virtue of this act, to arrest any person whom he shall see actually engaged in the commission of any offence in violation of the first section of this act, and to seize all liquor kept in violation of said section, at the time and place of the commission of such offence, together with the vessels in which the same is contained, and forthwith to convey such person before any magistrate of the same city or town, to be dealt with according to law, and to store the liquor and vessels so seized in some convenient place, to be disposed of as hereinafter provided. It shall be the duty of every officer by whom any arrest and seizure shall be made under this section, to make complaint on oath against the person or persons arrested, and to prosecute such complaint to judgment and execution. It shall be the duty of every such officer, whenever he shall see any person intoxicated in any store, hotel, street, alley, highway or place, or disturbing the public peace and quiet, to apprehend such person and take him before some magistrate, and and if said magistrate shall, after due examination, deem him too much intoxicated to be examined, or to answer upon oath correctly, he shall direct said officer to keep him in some jail, lock-up, or other safe and convenient place, to be designated by said magistrate, until he shall become sober, and thereupon

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forthwith to take him before said magistrate, or if he cannot be found, before some other magistrate; and whenever any person shall appear or be brought before any magistrate, as provided in this or the preceding section, it shall be the duty of such magistrate to administer to such person an oath or affirmation, and to examine him as to the cause of such intoxication, and for the purpose of ascertaining whether any offence has been committed against any provision of this act. If, upon such examination, it shall appear that any such offence has been committed within the jurisdiction of such magistrate, it shall be his duty to issue a warrant for the arrest of the offender, and the search of his premises, as hereinbefore provided. If it shall appear that any such offence has been committed at any place beyond the jurisdiction of such magistrate, it shall be his duty to reduce such examination to writing, and forthwith to certify and send the same to any officer or magistrate having jurisdiction of the offence charged, who shall thereupon proceed in relation to such complaint, in the same manner as if the same had been made before him. If any witness shall refuse to be sworn or affirmed, or to answer any question pertinent to such examination or trial, other than such as will criminate himself, he shall be committed to the common jail of such county, there to remain until he shall consent to be sworn or affirmed, and to answer all questions pertaining to such trial or examination. It shall be unlawful for any person to be or become intoxicated in any store, grocery, lane, street, or public place, and for each offence he shall be liable to a fine of ten dollars, to be sued for and recovered in the same manner as fines in the fourth section of this act, and in default of the payment thereof, he shall stand committed as provided in said fourth section; and it shall be the duty of the magistrate before whom such intoxicated person is arraigned, to examine such person as a witness relative to the cause of his intoxication, to ascertain whether any other person has violated the provisions of this act; but the testimony so given shall not in any case be used against him, in any civil or criminal action, except upon an indictment and trial for perjury. All such fines shall be applied to the sup-

port of the poor of the city or town where the offence is committed.

§ 13. All liquors seized under any provision of this act, except in cases where the owner thereof shall have been arrested, shall be kept stored for thirty days after service and posting of notices, as required by section seventh, after which time, upon the proof of such service and posting by the return of the officer endorsed upon the warrant of search, or by other evidence to that effect, such liquors, together with the vessels in which the same were contained, shall be adjudged forfeited, by the magistrate named in such notice, to whom such proof shall have been made, unless they shall have been claimed as hereinbefore provided: and all liquors, and vessels in which they are contained, which shall have been found and seized in the possession of any person who shall have been arrested for violating any provision of the first section, and not claimed by any other person, shall, upon conviction of such person of such offence, be adjudged forfeited.

§ 14. It shall be the duty of every supervisor and superintendent of the poor, and overseer of the poor, and it shall be the right of every other person, whenever he shall have any knowledge or information that any offence has been committed under any provision of this act, to make complaint, or cause complaint to be made thereof, and to prosecute such complaint in the name of the people. In case any person, other than an officer, shall not make out a prima facie case before the magistrate upon the trial of any complaint under the first section, and it shall appear to the court that he acted maliciously, or in bad faith, or without probable cause in making such complaint, the court shall render judgment against such person in favor of the defendant for the costs, and issue execution thereon, against the property and person, in the same manner as in civil actions before justices of the peace. Whenever any fine, imposed under any provision of this act, except when otherwise especially provided, shall be collected, it shall be paid, together with all costs, to the overseers of the poor of the town in which the offence was committed, for the support of the poor, in cases

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poor are supported by the county, then to the treasurer of the county.

§ 15. A certificate, duly proved to be under the hand of any magistrate, stating any such offence charged against any person, and judgment thereon, shall be evidence, in all courts and places, of the facts stated therein.

§ 16. No person who shall have been convicted of any offence against any provision of this act, or who shall be engaged in the sale or keeping of intoxicating liquors contrary to the provisions of this act, shall be competent to act as a juror upon any trial under any provision of this act; and when information shall be communicated to the court that any person summoned as a juror upon any such trial, has been so convicted, or is engaged in such unlawful sale or keeping, or is believed to have been so convicted, or to be so engaged, it shall be the duty of the court to examine such person upon oath in relation thereto; and no answer that he may make shall be used against him in any action or prosecution which may be commenced against him under any provision of this act, except for perjury on such examination; but he may decline to answer, in which case he shall be discharged as a juryman on such trial. No person shall maintain an action to recover the value or possession of any intoxicating liquor sold or kept by him, which shall be purchased, taken, detained, or injured by any other person, unless he shall prove that such liquor was sold according to the provisions of this act, or was lawfully kept and owned by him.

§ 17. Upon the trial of any complaint commenced under any provision of this act, proof of the sale of liquor shall be sufficient to sustain an averment of an unlawful sale, and proof of delivery shall be prima facie evidence of sale. No evidence shall be received in justification of such sale under the second section, unless the defendant, in his plea or answer, shall have avowed such sale under said section, and shall have accompanied such plea or answer with an affidavit or affirmation that, at the time of such sale, he verily believed that the liquor sold was intended by the purchaser to be actually used in some

other way than as a beverage, and not to be sold, disposed of, or given away, or used on the premises, or that such purchaser was duly authorized to sell liquor as provided by the second section of this act, as the case may be, and also setting forth the circumstances of such sale, and the reasons upon which such belief was founded.

§ 18. No person or corporation shall knowingly carry or transport any liquor within this state, from any place within the United States, and no person shall knowingly deliver any liquor to any other person, or to any corporation, for the purpose of being so carried or transported, unless the name and place of business or residence of the person to whom the same is conveyed, together with the words, "intoxicating liquor," are visibly and distinctly marked on the outside package or cask in which the same is contained. But this section shall not apply to the carrying of liquor in quantities of five gallons or less to any place within the county in which the same was sold, or within an adjoining county. Any person or corporation offending against any provision of this section, shall be liable to a penalty of fifty dollars, to be sued for and recovered by and in the name of any person who shall first commence an action therefor. No person for himself, or agent for any company or corporation, (engaged in the carrying either of persons or property,) shall act as agent for any person, for the purchase of any liquors, other than those authorized by this act, to sell the same while engaged in such carrying trade. Whoever shall violate this provision shall be liable to a penalty of one hundred dollars, as herein provided, to be sued for and recovered in the same manner as is provided for violations of section first of this act.

§ 19. In any county in which there now is, or hereafter may be a penitentiary, the court before which any conviction is had for any offence against any provision of this act, may, in its discretion, sentence and commit the person convicted to such penitentiary, instead of the jail of such county, and whenever the punishment under any provision of this act is imprisonment where such expenses are paid by the town; and where the

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or commitment, it shall be a commitment to the penitentiary or county jail without the liberties thereof.

§ 20. Every public officer who shall neglect or refuse to perform any duty required of him by any section of this act, shall, upon conviction thereof, be adjudged guilty of a misdemeanor, and shall be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding one year, or both such fine and imprisonment; such conviction shall work a forfeiture of office in all cases, except those of judicial officers. Any person who shall, directly or indirectly, oppose or resist an officer, or any one called by him to his aid, in the execution of any duty under this act, shall be deemed guilty of a misdemeanor, and punished by a fine of not less than two hundred dollars, and by imprisonment not less than six months. The existing provisions of law relative to misdemeanors and offences, shall apply to offences created by this act, except where the same are inconsistent therewith.

§ 21. There shall be allowed and included in every judgment for costs for the following services rendered under the provisions of this act, the following fees, which shall be audited and paid in the same manner as fees in other criminal cases, and whenever judgment shall be rendered for costs, there shall be included therein fees for such prospective services as shall be necessary to enforce such judgments; and when no fees are herein provided, the same fees as are now provided in criminal cases for similar services:—

To any magistrate performing the following services:

For every warrant or summons of any kind, twenty-five cents.

For the trial of any claim, one dollar for each day actually engaged therein.

For a certificate of conviction, twenty-five cents.

For taking and certifying complaint to another magistrate, fifty cents.

To any sheriff or other officer performing the following services:

For serving summons for witnesses, for each person served, twenty-five cents.

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For executing any warrant of search, or making any seizure without process, one dollar.

For conveying liquor seized to the place of storage, fifty cents, besides the necessary expenses of labor, cartage and storage.

For executing warrant for destruction of forfeited liquor, besides actual expenses, one dollar.

For conveying certified complaint to any magistrate, twenty-five cents.

For every mile necessarily traveled, more than one, in performing any of the above services, six cents.

To the person, other than the complainant, summoned to witness the destruction of forfeited liquor, for witnessing such destruction, and joining with the officer in making proof thereof, one dollar.

To any supervisor or superintendent of the poor, or overseer of the poor, two dollars for each day in which he is necessarily and actually engaged in attending to any complaint, or prosecution, and six cents for each mile necessarily traveled.

§ 22. Nothing in this act shall be construed so as to prevent the sale of cider in quantities not less than ten gallons. But no cider so sold shall be drank on the premises of the seller; and any such drinking, or a re-purchase by the seller of a portion of the cider sold by him, shall subject him to the penalties provided in section third of this act. Nor shall this act be construed so as to prevent the manufacturer of alcohol, or of pure wine from grapes grown by him, from keeping or from selling such alcohol or wine, nor the importer of foreign liquor from keeping or selling the same in the original packages, to any person authorized by this act to sell such liquors. Nor shall any provision of this act be construed to prohibit the manufacture or keeping for sale, nor from selling, burning fluids of any kind, perfumery, essences, drugs, varnishes, nor any other article which may be composed in part of alcohol or other spirituous liquors, if not adapted to use as a beverage, or in evasion of this act. Nor shall it be lawful to seize, sell or destroy any liquors deposited or found in any bonded warehouse within the

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limits of this state, nor prevent any liquors imported into the United States from being taken from such bonded warehouse to any place beyond the limits of this state. The term "intoxicating liquor," and "liquor," as used in this act, shall be construed to extend to and include alcohol, distilled and malt liquors, and all liquors that can intoxicate, and all drugged liquors, and mixed liquors, part of which is alcohol, distilled or malt liquor.

§ 23. It shall be the duty of the presiding judge of every court of oyer and terminer, and of every court of sessions, specially to charge every grand jury to inquire into all violations of or offences under this act.

§ 24. All acts and parts of acts, and all charters and parts of charters, inconsistent with this act, are hereby repealed. But no suit commenced, or indictment found, before this act takes effect, shall in any manner be affected thereby.

§ 25. No license to sell liquor, except as herein provided, shall hereafter be granted. All liquor kept in violation of any provision or provisions of this act, shall be deemed, and is hereby declared to be a public nuisance.

§ 26. The second section of this act shall take effect on the first day of May next; section twenty-five shall take effect immediately; and all parts thereof on the fourth day of July next.

J. F. BARNARD and H. A. NELSON, *for defendant, Berberich.*
JOHN THOMPSON and T. C. CAMPBELL, *for People, in the first cause.*

JOHN A. LOTT and A. HADDEN, *for defendant, Toynbee.*
JOHN M. VAN COTT and NATHANIEL F. WARING, *for People, in the second cause.*

BROWN, Justice. Philip Berberich, the defendant in the first of these actions, was arrested under the act of the 9th of April, 1855, entitled "An Act for the Prevention of Intemperance, Pauperism, and Crime," charged with having in his possession, with

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intent to sell, and with having sold, intoxicating liquor, called "lager bier." He was brought before E. Q. ELDRIDGE, Esq., county judge of Dutchess county, and upon a trial by a jury was found guilty. At this stage, and before sentence, the proceedings were removed into this court by *certiorari*.

Thomas Toynbee, the defendant in the other action, was also arrested under the same act, without warrant, by John Matthews, a police officer, and brought before D. K. Smith, a police justice of the city of Brooklyn, and there charged with being in the act of selling intoxicating liquor, to wit, one glass of brandy; and also with having in his possession other intoxicating liquor, to wit, champagne wine, with intent to sell the same. The wine was seized by the officer. At the trial before the justice, without a jury, sitting as a court of special sessions, Toynbee was found guilty, and sentenced to pay a fine of \$50, with \$5.86 costs, and to be committed until such fine and costs be paid, for a period not exceeding fifty-six days. It was also adjudged that the liquor* seized be forfeited, and a warrant issued for its destruction. The defendant appealed to the general term of this court; and thus we have the principal questions which arise upon the construction of the act—its force and obligation as a law—presented for the consideration and judgment of this court.

The object to be effected by the statute under which these proceedings are had, must be ascertained from an examination of its various sections—twenty-six in number. If its office is one of mere regulation—to prescribe by whom, and to whom, and at what places, liquors in certain quantities may be sold—then it does no more than the excise law, which it is thought to supersede; and although prejudicial to existing interests, and may subject certain classes to some privations and inconveniences, it is nevertheless a law of binding obligation, which the people must obey, and the tribunals of justice enforce. If, however, its office and purpose is greater and more comprehensive than mere regulation: if it aims at prohibition—prohibition of sales as well as of general and ordinary uses, to an extent which deprives the subject of

the law of its value, and strikes down the vast and varied interests concerned in its importation, sale, and production: if it provides for the seizure, forfeiture, and destruction of an article or thing, the product of human industry, hitherto invested with the attributes of property, solely because its producers or owners design to make it the subject of sale and transfer, to deal in it and with it as property, and apply it to general uses,—then the question assumes a very different character, and we are brought to inquire whether an *act* pregnant with such consequences, and armed with such unusual and dangerous powers, is really within the sphere of legislative authority. It is just to observe, that while sales by persons generally, and for general uses, are expressly forbidden, there is no positive interdict against its general use when lawfully acquired. Yet as there can be no lawful sales after the act takes effect, except by the authorized vender for certain special purposes—and as the act is careful to impose one of its penalties upon the purchaser from authorized venders, under a false representation that it is designed for an authorized use—it seems clear that the intent was to interdict the general use.

Section 1 forbids the sale, and the keeping for sale, or with the intent to sell, except in the cases enumerated in the subsequent sections, and also in the cases mentioned in the last clause of the same section, which clause is supposed to be of doubtful import. The sale excepted from the prohibition of the first section, other than those in the latter clause, are sales to authorized venders, and sales by them for mechanical, chemical, and medicinal purposes, and of wine for sacramental uses: also sales of cider in quantities not less than ten gallons, sales of alcohol by manufacturers, of wine from grapes grown by the seller, and of foreign liquor in the original packages to authorized venders. Section 4 declares offences against the act misdemeanors, and provides for their punishment by fines and imprisonment. Section 5 designates the officers who shall have cognizance of such offences, and prescribes the form of the proceedings and of the trial. Sections 6 and 7 contain what are called the search and seizure clause; and section 10 provides

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for the condemnation and destruction of the liquor. Section 15 authorizes sheriffs, marshals, constables, and policemen to serve the process, arrest persons in the act of selling, and to seize, without warrant, liquor kept against the provisions of the act.

The owner may interpose a claim to the liquor seized pursuant to the provisions of section 7, but he must first purge himself, under oath, of any design to disobey or evade the law, before he can be noticed or heard. Section 16 deprives the owner of his right of action to recover the value of any liquor sold to a purchaser, or taken, detained, or destroyed by a wrong-doer, unless he shall prove that such liquor was sold according to the provisions of the act, or was lawfully kept and owned by him. And section 17 declares, that upon the trial of any action to enforce the penalties and forfeitures, proof of a delivery shall be deemed evidence of sale, and proof of sale shall be sufficient to sustain the averment of unlawful sale. Section 25 declares all liquors kept in violation of any provisions of the act a public nuisance.

The abatement of public nuisances is one of the remedies by the act of the party, which the law concedes to any person injured; and he may proceed to the removal and destruction of the nuisance without the process or judgment of any court. (3 *Black. Com.* 5.) So that if this clause is to have any effect, it can be none other than to invite and justify depredations upon the proscribed article. These provisions are vindictive. They are novel and unusual. If we except some few states of the confederacy, who have recently entered upon a similar course of legislation, they have never before found a place in the written code of a civilized country. They are designed to work a forfeiture of goods—a deprivation of liberty and property—by means unknown to the common law. They set aside the just and humane rules of evidence, approved by time and sanctioned by sound policy. They assume a delivery to be a sale, and proof of a sale sufficient to sustain an averment of unlawful sale. And they refuse to notice or hear a citizen in defence of his own property, unless he first submits to take

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the oath demanded by the act, and discloses the facts upon which he relies to establish his innocence.

It awakens strange emotions, in this age of progress and improvement, to behold enactments like these embodied amongst the written laws of a people distinguished for their moderation, their moral excellence, their love of justice, and their ready perception of the distinction between right and wrong; a people of Anglo-Saxon lineage, versed in the jurisprudence of *Coke* and *Blackstone*, and *Kent* and *Story*, and who are proud to trace the fundamental principles of their government upward through the revolutionary struggles of 1776 and 1688, the conflicts and trials of the great rebellion, back to the conferences of the barons at Runnymede.

Impressed by the novel and extraordinary features of the act, and the doubts suggested by its perusal, I turn to the organic law, as the true test of legislative power, and regardless, for the time, of the subordinate questions involved in the controversy, proceed to inquire whether its provisions do not fall within the prohibitions of the constitution. I shall assume, for all the purposes of this argument, that the prohibitions of the act extend as well to liquors which are the growth and manufacture of foreign countries, as to those which are of domestic origin. Indeed, if we look at its title—to which resort may be had to remove ambiguities when the intention of the lawgiver is not plain—and read the closing sentence of section 1, (which is thought to exclude foreign liquors,) in connection with that part of section 22 which declares that it shall not be construed “to prevent the importer of foreign liquor from keeping or selling the same to any person authorized by the act to sell such liquors,” the intention of the legislature to include both kinds can hardly admit of a doubt. The exception upon which the uncertainty arises proceeded, doubtless, from a desire that the law should conform to the decision in *Brown* agt. *The State of Maryland*, referred to hereafter. And the obscurity and want of precision in the language employed, must, upon the usual rules of construction, yield to the intention, when that can be ascertained from an examination of the law itself.

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In neither of these cases under consideration were the defendants impleaded or brought to trial upon the indictment of a grand jury. Indeed, the law contemplates no preliminary inquiry by the grand inquest. The counsel for the defendants insist that it is, in this respect, in conflict with that part of section 6 of article 1 of the constitution, which declares that "no person shall be held to answer for a capital or otherwise infamous crime, (except, &c.) unless on presentment or indictment of a grand jury." This involves an inquiry into the character of the crime created by the act. Is it an infamous crime?—Offences which rendered the perpetrator infamous at the common law, were treason, felony, and the *crimen falsi*. It is not easy to define the meaning of and extent of the latter term with certainty. It not only involved falsehood, but offences which injuriously affected the administration of justice. It was the infamy of the crime, and not the nature of the punishment, which constituted the *crimen falsi*. Thus a conviction for libel, or for seditious words, or for keeping a gambling-house, did not render a man infamous. (*Wharton's Crim. Law*, 354; 1 *Rus. on Crimes*, 45; 1 *Phil. Evid.* 38; *Barker agt. The People*, 20 *Johns. Rep.* 457; *Peak's Evid.* 126.)

The present constitution was adopted in 1846. At that time, the term "infamous crime" was, and still is, defined (in the 2d vol. *Revised Statutes*, 587, § 31,) to include every offence punishable with death or by imprisonment in the state prison, and no other. Such is also the statutory definition of felony. The framers of the constitution must have understood, and intended that others should understand, the term in the legal sense then given to it. And it does not embrace the offence created by the act under consideration. It is not, therefore, a valid objection, that the defendants were impleaded and put upon their trial without the indictment of the grand jury.

We have already seen that the object of the law is prohibition. For general and ordinary uses—for all but a few special purposes—liquors having intoxicating properties are to be banished from society, and neither bought nor sold. The trades and employments connected with their importation, manufac-

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ture, and distribution, are to be suspended or put down, and the interests which supply such trades and employments with capital, raw material, labor, and means of transport, are to find other fields of enterprise, or be put down with them. This brings me to consider the principal question discussed upon the argument, which is this:—Does the legitimate authority of the legislature extend to the enactment of laws prohibitory of the common and ordinary use of property? Can this department of the government, in the execution of the trusts confided to it, declare by statute an article or thing, the product of human industry, or the creation of human skill, long recognized as property, and of all but universal use, and perfectly inoffensive in itself, to be a public nuisance, and thus authorize and justify its destruction?

It is worth while, before we proceed further, to inquire what the proscribed article or thing is—to consider its qualities and uses, and whether it is invested with the attributes of property, so as to entitle it to the protection of the constitution.

The taste for intoxicating drinks is thought to be an instinct of our nature—an operation of the principle of organized life, and not an artificial appetite or desire peculiar to races or tribes, and induced by habit, or climate, or other external influences. History and tradition corroborate the results of chemical and physiological investigation. With the earliest Hebrews, the most ancient Egyptians, with the refined and resolute Romans, wine was the favorite beverage—if not a part of the customary food.

Among the nations whose empires were upon the shores of the Mediterranean and its adjacent seas, long before the Christian era, the fruit of the vine and the olive, together with the cereal grains, were the staple products of agriculture, and the principle articles of trade and commerce. “Savage and civilized tribes, near and remote—the houseless barbarian wanderer, the settled peasant, and the skilled citizen—all have found, without intercommunion, through some common and instinctive process, the art of preparing fermented drinks, and of procuring for themselves the enjoyments and miseries of intoxication.

The juice of the cocoa-nut tree yields its toddy wherever this valuable plant can be made to grow. Another palm affords a fermented wine on the Audean slopes of Chili: the sugar palm intoxicates in the Indian Archipelago, and among the Moluccas and Philippines; while the best palm wine of all is prepared from the sap of the oil-palms of the African coast. In Mexico the American aloe gave its much-loved *pulque*, and probably also its ardent brandy, long before Cortez invaded the ancient monarchy of the Aztecs. Fruits supply the cider, the perry, and the wine of many civilized regions—barley and the cereal grains the beer and the brandy of others: while the milk of their breeding mares supplies, at will, to the wandering Tartar, either a mild, exhilarating drink, or an ardently intoxicating spirit. And to our wonder at the wide prevalence of this taste, and our surprise at the success with which, in so many different ways, mankind has been able to gratify it, the chemist adds a new wonder and surprise, when he tells us that, as in the case of his food, so in preparing his intoxicating drinks, man has everywhere come to the same result. His fermented liquors, whenever and from whatever substances prepared, all contain the same exciting alcohol, producing everywhere, upon every human being, the same exhilarating effects." The wines of France, Italy, and Spain, the beer of the German states, and the ale and porter of the British islands, enter largely into the domestic consumption of the inhabitants of those countries, as a part of their daily food. With our own citizens, the use of fermented liquors, in some form or other, is all but universal. Either as a beverage or in the preparation of their food, few families are entirely without it.

Should these facts suggest the probable result of movement to quench an appetite so prevalent and so deeply seated, by interdicting the use of the means which a wise and beneficent Providence has everywhere furnished for its gratification, they also show that whenever and wherever man rises above the savage condition, and begins to exhibit the rudiments of civilization, intoxicating drinks, and the fruits and grains from which they are expressed or extracted, are among the first things

which he separates from the common stores of nature, appropriates to individual use, and impresses with character and attributes of property.

Chemical and physiological science must determine whether alcohol, the essential element of intoxicating liquors, is food for the invigoration, or poison for the destruction, of the human system. The law is only concerned to know whether they fall within the catalogue of things which it recognizes as property. I find no definition of property that does not apply to intoxicating liquor. It has been separated from the common stock of nature for private use. It is that over which man may exercise absolute dominion, to the exclusion of every other person. By many, it is regarded as an article of diet;—by all, as one of trade. It is bought and sold, lost and acquired, like other property. The law in question treats it as property—authorizes its sale under certain limitations and for certain prescribed uses. And when it speaks of its forfeiture, it means a forfeiture of the right of property. In every sense of the term it is property, endowed with the same rights, and subject to the same measure of control, as other property, and no more.

The learned counsel for the people, in the case against *Toynbee*, insists that the legislative department of the state, being founded upon the model of the English parliament, has power to declare and limit the uses to which property may be applied, and when it shall cease to be property. This power, he argues, results, 1. From the express grant of the constitution; 2. From the general illimitable nature of legislative power required for the ends of society; 3. From being co-extensive with the law-making power in a democracy; and, 4, From the fact that discretion, legislative and judicial, is in its nature exclusive, and subject to no control. This, doubtless, is a true exposition of the power of the parliament of Great Britain, which is said to be “so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds.” So thought Lord COKE. (4 *Inst.* 36, and *Black.* 1st vol. Com. 140.) Such also is the opinion of Chancellor KENT, (1 vol. Com. 448,) in his remarks upon COKE’s expression in *Bonham’s* case, and

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upon that of Lord HOBERT, in *Day* agt. *Savage*, and of Lord HOLT, in the *City of London* agt. *Wood*. Names, eminent as jurists and statesmen, are not wanting, who maintain that there are limitations upon legislative power not written in the constitution, which are implied from the nature of popular sovereignty and representative government.

I decline to enter that field of inquiry, because, for present purposes, and indeed for any purpose designed to secure property, and liberty, and life, from aggression and misrule, the written limitations will be found amply sufficient, if expounded and applied in a liberal and resolute spirit. They come down to us from *magna charta*, and are sanctioned and approved by the wisdom and experience of near seven hundred years, and under our system are intended to save absolute, inherent rights, from the force of legislative acts which interrupt their enjoyment or impair their value.

Among the absolute, inherent rights of persons, Mr. *Blackstone*, (*Com. vol. 1*, 138,) enumerates the right of property, which "consists (he says) in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only *by the laws* of the land. And by a variety of ancient statutes it is enacted that no man's lands or goods shall be seized into the King's hands against the great charter and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law." The words "by the laws of the land," and "by course of law," here referred to, and the words "due process of law," found in the 6th section of the 1st article of the constitution, are synonymous, and have the same legal import and effect. We shall presently see what this is.

England has no written constitution, and therefore parliament is said to be transcendent in its authority. The provisions of the great charter, and the acts of later times, for the protection of life, liberty, and property, are statutory regulations, which parliament may repeal or modify at pleasure. They are limitations upon the power of the crown, and not upon that of

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parliament. The masses in Great Britain have never yet attained to the consequence and dignity of a contest for their absolute, inherent rights, except through the legislative and the judicial branches. It is a historical truth, that the struggle there has constantly been to put the real or pretended prerogatives of the crown under restraint: sometimes by the barons, as in the time of the great charter; sometimes by the judges, as in the time of Lord COKE; and sometimes by the parliament, and especially the house of commons, as in the times of the great rebellion, and the act for the settlement of the succession in 1688. We have incorporated the prohibitions of the English statutes for the protection of life, liberty, and property into our constitution, not as limitations upon executive authority, but as limitations upon legislative power. The same unrestrained dominion over property which the parliament and people of Great Britain have denied to the crown and reserved to parliament, the people of the state of New-York have denied to the legislature and reserved to themselves.

The latter clause of section 6 of the 1st article of the constitution is in these words:—"No person shall be subject to be twice put in jeopardy for the same offence; nor shall he be compelled, in any criminal cause, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." These provisions are not to be narrowed down by a literal construction. They are to be largely and liberally expounded. Their object is to secure the enjoyment of the rights to which they refer, and must have an interpretation which will effect that object. The terms, "life," "liberty," "property," and "due process of law," as they stand in the section, become of vital consequence in giving it a construction. To be of any real value they must have a fixed, permanent signification, one that shall remain unchanged by circumstances, or time, or the caprice of those to whom the restraining words of the section may become offensive or troublesome. The legislature may declare what a particular term or expression means when used in a statute. This is a

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customary and unexceptionable act. But it cannot declare what the same term or expression means, and thus enlarge or restrain its signification, when used in the constitution. It is of no consequence what the legislature think of it, or what import they attribute to it. The real inquiry is, what did the framers of the constitution mean by it, and what was its known legal definition and signification when the constitution was adopted? The word "property" must comprehend now whatever it comprehended in 1846. Any other rule would place at the absolute disposal of the legislature every right intended to be secured and consecrated by the limitations I have quoted.

The right of property, as we have seen, consists in the "free use, enjoyment, and disposal." Its incidents are the enjoyment, use, and the power of disposition. Are we to designate, classify, or define an interest or an estate which cannot be used, enjoyed, or sold and transferred? By what words and expressions shall we impart to others our idea of its nature and qualities? There can be no property, in the legal and popular sense of the term, where neither the owner, nor the person who represents the owner, has the power of the sale and disposition. That which cannot be used, enjoyed, or sold, is not property; and to take away all or any of these incidents, is, in effect, to deprive the owner of his right of property. This is precisely what the act "for the prevention of intemperance, pauperism, and crime," is intended to accomplish, and precisely what it will accomplish if it can be enforced, for it declares that the subject to which it refers shall neither be sold, nor kept for sale, nor with an intent to be sold. The statutes may, and it is their office to prescribe, the forms by which sales may be effected; that the title to real property shall only pass by deed acknowledged before an officer, or attested by a witness; that personal estate shall only pass by delivery in writing, or the payment of purchase money; that poisonous drugs, when sold, shall be so labeled. They may also declare that intoxicating liquors shall not be sold to minors, paupers, or habitual drunkards, or to be drank in the house of the seller, or by retail to be taken out of the house, unless he have a license, and be of good moral

character, &c. These are mere acts of regulation and conservation, and do not in the least impair the right of property.

There is another right incidental to the right of property, which, when abrogated or suspended, tends to the deprivation of property: that is, the right of action—the right to the protection of the laws, and to redress by the legal tribunals. The forms of action and of legal proceedings, the mode by which civil injuries are redressed, and rights asserted and defended in the courts, are classed as remedies, and are doubtless subject generally to legislative supervision and control. But when the law-making power comes to deal with the absolute, inherent rights referred to in the 6th section of the 1st article of the constitution, forms and modes of proceeding from being mere remedies, rise to the dignity of rights, which cannot be denied or withheld. The principle is asserted by Mr. Justice WASHINGTON, in *Green agt. Biddle*, (8 *Wheat. Rep.* 1, 75,) in the following language:—

“Nothing can be more clear, upon principles of law and reason, than that a law which denies to the owner of land a remedy, &c., or which clogs his recovery of possession by conditions and restrictions tending to diminish the amount and value of the thing recovered, impairs his right to and interest in the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist and be acknowledged, but it is impaired and rendered insecure according to the nature and the extent of such restrictions.”

Blackstone, in his *Com. vol.* 1, p. 55, says: “The remedial part of a law is so necessary a consequence of the two former, (the declaratory and directory parts,) that laws must be very vague and imperfect without it. For, in vain would rights be declared, in vain directed to be observed, if there were no method of recovering or asserting those rights when wrongfully withheld or invaded. This is what we mean, properly, when we speak of the protection of the law.”

Mr. Justice TANEY, in delivering his judgment in *Bronson*

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agt. *Kinzee*, (1 *How. Rep.* 311.) and applying this principle to laws which impair the obligations of contracts, says: "Although a new remedy may be deemed less convenient than an old one, and may, in some degree, render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contracts; but if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution."

In *Holmes agt. Lansing*, (8 *John. Cases*, 75,) Chancellor KENT, speaking the judgment of this court, says: "So long as contracts were submitted, without legislative interference, to the *ordinary and regular course of justice*, and existing remedies were preserved in substance and with integrity," the constitution was not violated.

And Judge DENIO, in pronouncing the judgment of the court of appeals in *Morse agt. Gould*, (1 *Kernan*, 281,) also says: "It is admitted that a contract may be virtually impaired by a law which, without acting directly upon its terms, destroys the remedy, or so embarrasses it that the rights of the creditor under the legal remedies when the contract was made are substantially defeated."

With this necessary qualification, the jurisdiction of the states over the legal proceedings of the courts is supreme. These authorities sufficiently indicate the distinction between rights and the remedial process of the law for their vindication, when wrongfully withheld or invaded, and they also define and mark the utmost verge and limit of legislative power when applying remedies to absolute, inherent rights, which the people have reserved to themselves by the limitations of the constitution. This right of action to redress and protection, by the venders and owners of intoxicating liquors, is seriously impaired—if not in effect destroyed—by the conditions imposed by the latter clause of the 16th section of the act in question.

Those provisions of this act which I have endeavored to show

tend to the deprivation of property, cannot, by any process of reasoning, be brought within the meaning of the terms "by the laws of the land," and "by course of law," used in the English statutes, or the "due process of law" of the 6th section of article 1 of the constitution. Lord COKE says, that the words "by the law of the land," mean, by the course and process of law, "by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by original writ of the common law." "The law of the land, in bills of rights, does not mean merely an act of the legislature, for that would abrogate all restraints upon legislative authority. The clause means, that the statute which deprives a citizen of the rights of person and property, without a regular trial according to the course and usage of the common law, would not be the law of the land in the sense of the constitution." (*Hoke agt. Henderson*, 4 Dev. 1.) The words "due process of law," in this place, cannot mean less than a prosecution or suit instituted and conducted according to the forms and solemnities for ascertaining guilt or determining the title to property. It will be seen that the same measure of protection against legislative encroachments is extended to life, liberty, and property; and if the latter can be taken without a forensic trial and judgment, then there is no security for the others. If the legislature can take the property of A, and transfer it to B, they can take A himself, and either shut him up in prison or put him to death. But none of these things can be done by mere legislation. There must be "due process of law." This expressive language of Mr. Justice BRONSON, in *Taylor agt. Porter*, (4 Hill, 140,) has often been quoted, and cannot be too often repeated. It should be engraven upon the walls of the legislative chamber, as a perpetual memorial that there are bounds to legislative authority. *Vide*, also, the opinions of Judge DENIO and of the late Mr. Justice EDWARDS in *Westervelt agt. Gregg*, (2 Kernan, 202.)

"The prescribed forms and solemnities for ascertaining guilt and determining the title to property," comprehend as well the forms of procedure as the legal presumptions and rules of evi-

dence by which the guilt is to be ascertained or the title determined. These presumptions and rules are also a part of the remedial process of the law, and their alteration and modification is, doubtless, to a certain extent, within the power of the legislature; but in cases which affect the personal rights secured by the constitution, the changes must leave the right unimpaired, and place no material impediments or obstructions in the way of those who are concerned in asserting it. In trials for crimes, and to enforce penal statutes, the presumption of innocence obtains until it is disproved, in all cases, and in trials to redress civil injuries and enforce civil rights, the presumption of title and right is with the defendant until it otherwise appears, unless in his pleadings he voluntarily assumes the *onus probandi*. In proceedings which aim at the deprivation of liberty and property by fines and forfeitures, and the pains of imprisonment, that is not due process of law, which reverses the wholesome and humane rules of the common law, and substitutes the presumption of wrong and guilt for that of right and innocence. In this respect the provisions of section 17 of the act are highly offensive.

Nor can the force and efficiency of the constitutional limitations be evaded or averted by the declaration of the 25th section of the act, that intoxicating liquors are a public nuisance. In the words of Chief Justice RUFFIN, "such a construction would abrogate all restrictions on legislative authority." If a class of citizens can be deprived of a particular kind of property by a legislative declaration that it is a public nuisance, then another class may be deprived of liberty by a legislative act proscribing them as malefactors and felons. Grant this power to the legislature, and the limitations of the constitution are no longer of any value. Every kind of property may be put without the pale of the laws and the protection of the courts, and exposed to seizure and forfeiture by a simple act declaring the proscribed article to be a public nuisance. The existence of such a power is inconsistent with the theory of a limited representative government, because it is destructive of the ends which such government is designed to accomplish.

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The 25th section proceeds upon a misapprehension of what a nuisance is. Common or public nuisances are offences "against the public order or economical regimen of the state, being either the doing of a thing to the annoyance of the King's subjects, or the neglecting to do a thing which the common good requires." (4 *Black. Com.* 196.) Impediments and obstructions placed in highways and navigable streams are nuisances *per se*, because they interrupt the passage and thereby annoy others. Trades and manufactures of certain kinds become nuisances from the places where and the manner in which they are conducted. Animals, such as dogs, swine, &c., are not nuisances until they become offensive by being suffered to run at large or kept in the vicinity of men's habitations. So, an accumulation of vegetables and fruits in process of decay, the flesh and offal of animals, gunpowder, drains and sewers in cities and populous places, may or may not become public nuisances by their localities and other attendant circumstances. The true test is, that the thing, trade, or business, is in some way detrimental to the public; for the elementary writers say, "common nuisances may be abated or removed by the party annoyed or injured, who is not required to wait for the slow progress of the ordinary forms of justice."

Liquors that intoxicate exhibit none of the qualities which constitute a common nuisance. They obstruct no navigable rivers, and impede the passage of no public highways. They create no noise to disturb the public, tranquility and peace. They exhale no offensive odors to taint the air and impair the public health. Nor do they endanger the security of persons or of property, by a tendency to ignition and explosion. In the stores of the importer, the vaults of the brewer, and the cellars of the wine-grower and consumer, they are as harmless as the wood or glass in which they are inclosed. He who knows how to enjoy them with reason and moderation, or has the moral courage and self-denial to let them alone, may consider himself free from annoyance and danger. They may be, and doubtless are, converted to base uses—uses which produce "intemperance, pauperism, and crime," and, I may add, moral

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degradation and grief, and anguish unspeakable. And then the places where they are thus used, and those concerned in prostituting them to such uses, fall clearly within the province of legislative regulation and control, and the maxim, "*Sic utere tuo ut alienum non ledas*," applies in all its force. But intoxicating liquors cannot be deprived of the defences with which the constitution surrounds the property of the citizen, by an act proscribing it as a public nuisance.

There are some observations of Justices TANEY and WOODBURY, in the opinions delivered by them in the cases against the states of Massachusetts, Rhode Island, and New Hampshire, (5 How. 504,) which are thought to favor the idea that the states may pass laws prohibitory of the uses and sales of ardent spirits, subject to the right of importation and of sale by the importer. Those who attach any value to expressions which are *obita dicta*, and not necessary to the decision of the precise question under examination, will do well to remember that the language referred to, asserts the absence of anything in the constitution of the United States, which forbids the passage of prohibitory laws, and nothing more.

The cases in which the observations occur, determined that the excise laws of the several states named in the proceedings did not conflict with the authority given to congress to regulate commerce with foreign countries, and among the several states, and nothing else. The power of a state exercising its sovereign authority, is that to which these learned judges refer; but the power of a state legislature, exercising its authority under such restraints and limitations as its constituents may have imposed upon it, is quite a different thing, and one which they did not consider. The question here is, not what the legislature might do were these limitations removed or modified, nor what the people of the state might do, by an amendment of the organic law, but what the legislature may now do with the limitations in full force.

A distinction has also been suggested between the power of the legislature over property in liquors acquired and existing at the time the act took effect, and property in liquors acquired after-

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wards. The act itself recognizes no such distinction, and does not discriminate between present and future acquisitions, but applies its penalties, forfeitures and disabilities with unsparing rigor to those who now own and to those who may hereafter own such property. In this respect I think it entirely consistent with itself; for a constitutional security which does not cover future as well as present acquisitions is of no practical value, and will afford no sort of guaranty against intentional or mistaken aggression.

Here are a class of citizens, who have invested their property, and spent the best years of their lives in learning and establishing a particular business or trade, inoffensive and commendable in itself—the growth and manufacture, it may be, of wine—the culture of barley and hops—the manufacture of fire-arms and gunpowder—fabrication of type, printing presses, and paper—and then comes a legislative act, confessing its incompetency to invade or disturb existing interests, and declares that because wine and the decoction of barley and hops may lead to intoxication—fire-arms and gunpowder to war, bloodshed, and the destruction of human life; and types, printing-presses and paper to blasphemous, libelous, and obscene publications—all future acquisitions of the kind shall cease to be regarded as property, and be no longer entitled to claim the benefit and protection of the laws.

Let this fancied distinction between present and future acquisitions once obtain, and property will not hereafter depend for its security upon a permanent rule of constitutional law, but upon legislative moderation and forbearance, and such limitations as legislative wisdom and discretion may put upon its own authority.

But let us look upon this distinction in another aspect. *Brown* agt. *The State of Maryland*, (12 *Wheaton*, 419,) decides that a state law, requiring importers of foreign goods (including liquors) to take out a license before proceeding to sell by the bale or package, is repugnant to the constitution of the United States, and void. In other words, that a state has no power to prohibit sales of foreign goods by the importer, in the bale or

package in which they were imported. It was argued, in behalf of the state, that whenever the goods entered its jurisdiction the power of congress ceased, and that of the state was substituted in its place. Chief Justice MARSHALL answered the argument in this wise :—

“Commerce is intercourse. One of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficiency should be complete, should cease at the point where its continuance is indispensable to its value. To what purpose should the power to allow importations be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is one essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the entire thing, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importations but to authorize the importer to sell.”

Here, then, is a positive affirmation that the right to sell, by the importer, is a component part of the power to regulate commerce; and that congress may, in disregard of state legislation, authorize the importer to sell. Now, the right to sell by the importer implies the right to purchase by some other person; because there can be no sale if there is no person to purchase. Had the state of Maryland, in place of prohibiting sales by the importer, gone further, and prohibited purchases from the importer by its own citizens, can there be a doubt that such a prohibition to purchase would have been held equally void as the prohibition to sell, and equally hostile to this exclusive right of congress to regulate commerce? When, therefore, a citizen of the state of New-York becomes the purchaser of foreign liquor from the importer, he acquires a right of property under the paramount law of the United States, as sacred and secure from legislative invasion and aggression as rights of property which were vested at the time the law under consideration took effect.

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If the judgment in the case of *Brown agt. The State of Maryland*, and the reasoning of the chief justice, is entitled to any weight as authority, it is decisive of the question so far as sales of foreign liquors by importers is concerned. The right of importation, we see, means the right to introduce foreign goods into the country, and to sell them to those who may choose to become purchasers. If state legislation can substantially take away from the mass of its citizens the power to become purchasers, a state can, in effect, impede foreign trade, and put an end to foreign importations. It has only to declare—what the act under examination declares—that the importer shall only sell in the original packages, to such persons as the state may license and authorize to become purchasers. Sale is no longer incidental to importation. The importer's right to dispose of his goods in the market, no longer depends upon the authority given to congress to regulate commerce and intercourse with foreign countries. But it depends alone upon the disposition of the states to suffer their citizens to become purchasers of foreign commodities. I am unable to perceive any difference between state resistance to foreign importations by interdicting sales by and purchases from the importer, and resistance by a preventive force stationed upon its own borders. Either mode is an unwarrantable interference with a subject of legislation over which congress has exclusive control and dominion.

The laws which prohibit intermural interments, referred to upon the argument, stand upon the intelligible and constitutional ground of police regulations to prevent nuisances. (*Coats agt. The Mayor, &c., of New-York*, 7 *Wend.* 585.) And the statutes which authorize the destruction of buildings to arrest the progress of fire or the ravages of pestilence, are justified by the law of overruling necessity, and is the exercise of a natural right to avert a great public calamity. (2 *Kent's Com.* 338; *Russell agt. The Mayor of New-York*, 2 *Denio*, 461.)

I therefore arrive at the conclusion, that so much of the 1st section of the act under consideration as declares that intoxicating liquor shall not be sold or kept for sale, or with intent to be sold, except by the persons, and for the special uses,

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mentioned in the act; so much of sections 6, 7, 10, and 12, as provide for its seizure, forfeiture, and destruction; so much of the 16th section as declares that no person shall maintain an action to recover the value of any liquor sold or kept by him, which shall be purchased, taken, detained, or injured, unless he can prove that the same was sold according to the provisions of the act, or was lawfully kept and owned by him; so much of section 17 as declares that, upon the trial of any complaint under the act, proof of delivery shall be proof of sale, and proof of sale shall be sufficient to sustain an averment of unlawful sale; and so much of section 25 as declares that intoxicating liquor kept in violation of any of the provisions of the act, shall be deemed to be a public nuisance, are repugnant to the provisions of the constitution for the protection of liberty and property, and absolutely void.

The proceedings in both cases are reversed and set aside, and Philip Berberich is discharged from his arrest.

S. B. STRONG, Justice. This cause (the case of *Toynbee*) comes before us on an appeal by the defendant from a judgment rendered against him by a police justice of the city of Brooklyn, for the alleged violation of the statute for the "prevention of intemperance, pauperism, and crime," commonly called the Prohibitory Act. The complaint was preferred before the justice by a policeman, pursuant to the 12th section of the statute. It stated, in substance, that on the 27th of July, 1855, the defendant sold, and kept for sale, and had in his possession with intent to sell, in Montague-street, in the third ward of said city, intoxicating liquor, to wit, brandy and champagne, in violation of the said statute; and that said offence consisted in selling one glass of brandy, and one bottle of champagne. When the defendant was brought before the justice, his counsel moved that he should be discharged on the grounds that it did not appear by the complaint, that any crime or offence whatever had been committed; and the act under which the prosecution had been instituted is unconstitutional and void. The motion was denied. The defendant then said that he did not request to be

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tried by a court of special sessions, but that he objected thereto, and offered to give bail to appear at the next court having criminal jurisdiction. The justice overruled the objection, declined to receive such bail, and required the defendant to plead to the charge.

The defendant thereupon pleaded not guilty. A trial was immediately had before the justice, without a jury; the defendant was convicted, and sentenced to pay a fine of fifty dollars and the costs; and it was adjudged that the intoxicating liquor should be forfeited. The defendant's counsel objected before the justice, that the complaint was defective, because it did not aver that the liquors alleged to have been sold were not liquors, the right to sell which in this state is given by any law or treaty of the United States. If such an averment was necessary, the justice should have dismissed the complaint by reason of the omission. The statute does not direct what the complaint shall contain, and that is, of course, left to the rules of the common law.

The complaint is a substitute for an indictment, so far as it relates to substance, and requires at least as much particularity—indeed, the authorities say more. Mr. *Chitty*, in his approved work on criminal law, (vol. 1, pp. 281–2,) says, “It is a general rule that all indictments upon statutes, especially the most penal, must state all the circumstances which constitute the definition of the offence in the act, so as to bring the defendant *precisely* within it.” “And,” he adds, “not even the fullest description of the offence, were it even in the terms of a legal definition, would be sufficient, without keeping close to the expressions of the statute.”

In the case of *The People agt. Allen*, (5 Denio, 79,) BEARDSLEY, C. J., says, “An indictment upon a statute must state all such facts and circumstances as constitute the statute offence, so as to bring the party indicted precisely within the provisions of the statute. If the statute is confined to certain classes of persons, or to acts done at some particular time or place, the indictment must show that the party indicted, and the time and place”—where and when—“when the alleged criminal

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acts were perpetrated, were such as to bring the supposed offence directly within the statute."

There can be no doubt as to the principle, it is reasonable and proper, and is not controverted by any respectable authority. The 1st section of the statute under consideration enacts, that intoxicating liquors, except as thereafter provided, shall not be sold, or kept for sale, or with intent to be sold, by any person for himself or any other person, in any place whatsoever. These expressions are certainly very broad and comprehensive, and they are not so restricted by their reference to subsequent exceptions, as to make any negation of such as are included in other sections, a necessary part of the description of any alleged prohibition. (*Popham*, 93, 4; *Hawkins*, b. 2, ch. 25, s. 113.) The last clause of the first section, however, declares expressly that the *section itself shall not apply* to liquor, the right to sell which in this state is given by any law or treaty of the United States. The statute does not forbid the sale of all intoxicating liquors. A large class certainly is exempt from the prohibition. It is not necessary that I should consider, in discussing this point, how far the qualification extends, but it is material to the decision of another point involved in this case, and I may as well express my opinion about it here.

The question which has been agitated upon this point is, whether the exception refers to foreign liquors only while in the hands of the importers, and contained in the original cask or vessel, when, according to the decisions of the supreme court of the United States, the right of sale is given by congressional legislation, or to such liquors at all times and in whatever condition they may be: in other words, whether it refers to the liquors *themselves* or to their *status*. It must be admitted that the language is susceptible (and I think equally susceptible) of either interpretation. In these cases the rules of construction are different, according to the character of the statutes—whether they are purely remedial or penal. The former is entitled to a liberal, while the latter is confined to a strict construction.

A statute is purely remedial when it furnishes additional

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means of redress to an existing wrong. In criminal cases it applies to something that is already *malum in se*, or *malum prohibitum*. It is then creative of the remedy only. As all are in favor of the due punishment of acknowledged crime, we readily admit that statutes designed for that purpose are entitled to a favorable construction. But it is otherwise when the statute creates a new offence. It is then an innovation, often an encroachment upon previous rights, and its correctness or justice is not always conceded, or generally admitted. The rule is, therefore, very properly, that such a statute should be construed strictly; that nothing should be deemed a crime under it but what is clearly and unequivocally defined. No man should be punished for an act (previously lawful) under a new statute, unless it clearly announces to him, beyond any reasonable doubt, that it is criminal. Now the statute under consideration is creating a new offence. True, it was a misdemeanor before, to sell strong or spirituous liquors or wines in quantities less than five gallons without a license. But the offence under the Revised Statutes was only a part of what was rendered a crime under the prohibitory act; and as the latter is integral, it is in effect new, and must be so considered.

Applying the principle of construction I have endeavored to illustrate, to the qualifying clause of the first section, and taking that by itself, the prohibition would not extend to imported liquors at all. But there is another rule in giving a construction to an expression in a statute equally indicative of two varied meanings, and that is, that the whole enactment must be considered, and if one of the interpretations is consonant to the other provisions and the main scope and design of the act, and the other not, that which is consistent shall prevail. It is not then a question of strict or liberal construction, but the preponderance produces reasonable certainty. Now, no one who reads the act in question, and considers its object, can hesitate a moment in coming to the conclusion that the legislature intended to prohibit mainly the sale of imported liquors as a beverage. Indeed, the statute would be wholly ineffectual

if it did not go to that extent. Instead of being an extension, it would be a relaxation of the old system.

I think, therefore, that the true way of reading the first section, is as a *prohibition of the sale of intoxicating liquors, not vendible beyond state legislation, in their existing condition, according to the decisions of the supreme court of the United States.* But to whatever extent the vendible liquors may go, their express exemption qualifies the description of those included in the prohibition. Men may still sell intoxicating liquors—all that is charged in the complaint—and yet not be guilty of any offence. It is undoubtedly true, that when a statute contains provisos and exceptions, in distinct clauses, it is not necessary to state in an indictment that the defendant does not come within the exception, or negative the provisos it contains. The reason given is, that these are matters of defence, which it is necessary that the accused should aver and prove. But that principle does not apply where, as in this case, the enacting section declares that it is inapplicable to the excepted matters. The statute does not, then, constitute them the subjects of offence; and it is not necessary for the accused to aver or prove any defence, until there is proof that he is guilty of what is condemned.

In the case of *Rex agt. Jarvis*, cited in a note to *Rex agt. Stone*, (1 *East*, 639,) Lord MANSFIELD said, that where exceptions are in the enacting part of the law, it must appear *in the charge* that the defendant does not fall within any of them. And FOSTER, J., who was an eminent criminal lawyer, remarked, that “where negatives are descriptive of the offence, then they must be set forth.”

The rules which I have stated are applicable to indictments which are preferred by a grand jury, and where the accused may have the benefit of a fair and deliberate trial by jury. But a greater degree of strictness is required in summary proceedings before an inferior jurisdiction, which does not afford to the defendants those advantages that the common course of law allows them. In such cases Mr. *Chitty* says, (*vol. 1, p. 284,*) it is necessary to show, by negative averments, that the defendants are not within any of the provisos or exceptions of the

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statute. It does not cure the difficulty that the defendant is charged with having sold liquors contrary to the form of the statute. That will not aid a defective description of the offence. Nor can the defect be cured by evidence. The evidence must be confined to the charge, and the accused cannot be required to answer any complaint except that which sets out an offence conformably to the rules of law. My conclusion upon this point is, that the complaint was radically defective, and that a conviction upon it cannot stand.

The next objection to the proceeding before the justice is, that by refusing the defendant's tender of bail for his appearance at the next court having criminal jurisdiction, there was, in effect, denied to him the constitutional right to be tried by a competent jury. The result of the denial was, that if the defendant had been tried by a jury, it must necessarily have been before one consisting of six persons, out of twelve to be summoned by the constable.

The jurors for our courts of special sessions are generally taken from the immediate neighborhood, and are liable to be influenced; and their verdict is sometimes controlled by the bias created by a public accusation for the commission of a crime in their own vicinity. They are ordinarily selected, too, by an officer who has had an agency in the preliminary steps against the accused, and who, as is sometimes the case with police officers, may be anxious to procure his conviction. Whereas the jurors, in our higher courts of criminal jurisdiction, are designated by responsible town officers; their names are deposited in a box kept by the county clerk, and are drawn by him in the presence of some of the county officers, and they are taken from the whole county. These measures are taken for the purpose of having intelligent and impartial jurors, and they are generally effectual. Besides, it is a matter of some importance to the accused, whether his character, his liberty, and his property are made dependent upon the verdict of twelve or of six men. Innocent men have sometimes escaped from the worst of punishment by the voice of a single juror—and in such cases the larger number of course affords the greater pro-

tection. It is true, too, that the chance of escape of the guilty is increased by the same means. But in the administration of justice, it is at least as essential to protect the innocent as to punish the guilty. The right claimed by the defendant is an important one; and if his claim was well founded, the subsequent proceedings should not have been had, and the judgment resulting from them against the accused was void.

On looking over the entire statute, it seems to me that the provisions relative to the trials under it indicate an intent to confine them to the special sessions. The magistrate who issues the original process constitutes the court—they are identical. The 5th section provides that such court shall not be required to take the examination of the accused, but *shall* proceed to trial as soon as the complainant can be notified. The provisions of the act relative to appeals apply exclusively to judgments in the courts of special sessions, and are mostly inapplicable to trials before the general sessions, or oyer and terminer. Many of them are very important. The right of appeal is given to the complainant as well as the defendant. If the defendant appeals, he is required to give a satisfactory bond that he will not, during the pendency of the appeal, violate any of the provisions of the statute. The ordinary power of amendment of the appellate court is considerably increased, and any judgment or verdict against evidence may be reversed on appeal, as (in the words of the statute) "in civil actions." It is not material to inquire here whether verdicts against evidence in civil actions can be reversed on appeal. I am considering the provision simply as indicative of the intention of the legislature. Now if it was designed, by constituting offences under the act misdemeanors, to confer the right to try the accused in the courts of general sessions and oyer and terminer, the legislature would, I think, have made the provisions relative to appeals applicable to those courts also, otherwise their work would have been but half done.

There are other provisions in the statute indicating a design that all trials under it should be had in the special sessions, and not any to the contrary. The rule in these cases is, that when

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the statute creates a new offence, and particularly describes a method of trial, and a punishment adequate to the offence for its violation, the complainants, whether the public or individuals, are confined to the remedies expressly given in such statute.

I am, therefore, inclined to agree with the justice in the conclusion to which he arrived, that, so far as the statute went, he could not be required to take the proffered bail. But the more important question arises, whether the (in effect) denial of the privilege claimed by the defendant, is not violative of the constitutional right of trial by jury. If it be so, the enactment, so far as it relates to compulsory trials in the courts of special sessions, is void.

The constitution of this state, which went into operation in 1847, ordains, (*Art. 1, § 2*), that the trial by jury, in all cases in which it has been heretofore used, should remain inviolate forever. The language is strong, and evinces the importance which was justly attached to the privilege. The terms used in the constitution must be applied according to their meaning at common law, unless a different interpretation is clearly indicated. There is no evidence of any different intent in reference to this provision, nor can any be inferred. A jury, by the rules of the common law, must consist of twelve men. It was, therefore, very properly remarked by JOHNSON, J., in *Cruger agt. The Hudson River Railroad Co.*, (2 *Kernan's R.* 198,) that the constitutional provision which I have quoted imports a jury of twelve men, whose verdict must be unanimous. In reference to the cases to which it refers, and whether they include the subsequently created cases, I will quote from an opinion in the case of *Wood agt. The City of Brooklyn*, (14 *Barb. R.* 432,) because it expresses my present sentiments on this subject:—

“This provision relates to classes, and of course includes the individual cases which they comprise. In no other way can constitutional enactments preserve that continued efficacy which is so essential for the public good. Whenever, therefore, a new case is added to a class, it becomes subject to its rules.

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A crime newly created is subject to any constitutional regulations relative to the class of crimes generally. The constitutional provision refers to usage, and that must control and define its application. It is a matter of public notoriety, that accusations for crimes have generally been tried before a jury. If these have been exceptions, they have not been sufficiently numerous to affect the general usage. The introduction of a new subject into a class renders it amenable to its general rules, not to its exceptions, unless there is something peculiar calling for that application. To allow the legislature to except from the operation of a constitutional provision by direct enactment, a matter clearly falling within its meaning, would sanction a fraud upon the organic law, and might in the end destroy its obligation."

These remarks were originally applied to penalties, but, in the quotation, I have substituted crimes to which they are alike applicable. The sentiments were expressed by me in 1852, and I cite them with the greater satisfaction, as they have recently received the concurrence of three of my brethren. The same principle was applied by Chancellor WALWORTH to the crime of murder, in the case of *The People* agt. *Enoch*, decided by the court for the correction of errors. (13 *Wend.* 159.) In his opinion in that case he made the following remarks:—

"Malice was implied in many cases at the common law, where it was evident that the offenders could not have had any intention to destroy human life, merely on the ground that the homicide was committed while the person who did the act was engaged in the commission of some other felony, or in an attempt to commit some offence of that grade. This principle is still retained in the law of homicide; and it necessarily follows, from the principle itself, that as often as the legislature *creates new felonies*, or raises offences which were only misdemeanors at the common law to the grade of felony, *a new class of murder is created*"—[it would probably have been more accurate to have said, the previously existing class was enlarged]—"by the application of this principle to the case of a killing of a human being, by a person who was engaged in the perpetration

of a newly created felony, the court and jury, in such cases, immediately *apply the common law principle*, and the killing is adjudged to be murder or manslaughter, according to the nature and quality of the crime that the offender was perpetrating at the time the homicide was committed."

There could not be a stronger case to illustrate the rule that newly created crimes are subject to the incidents of the class into which they are introduced, without any express provision to that effect in the statute. By the terms of the prohibitory act, the offence imputed to the defendant was characterized as a misdemeanor. The usage in criminal cases prevailing immediately before, and at the time of, the adoption of the constitution, and to which it refers, was undoubtedly conformable to the provisions of the Revised Statutes, which had been in operation since 1830. (2 R. S. 711, §§ 2, 3.) Pursuant to those provisions, persons accused of misdemeanors had the *right*, in *all cases*, to give bail for their appearance at the next court having criminal jurisdiction, which must be either the general sessions or oyer and terminer; and in their doing so, or, what was equivalent, making an offer to that effect, which was refused, a court of special sessions could proceed no further. That, in effect, secured to the accused at their option the right to be tried by a jury of twelve men, and to be exempt from punishment except by their unanimous verdict. That right was denied to the defendant in the case under consideration. If the prohibitory act called for such denial, it contravened the constitutional ordinance, and was so far void; or if it impliedly permitted the continuance of the privilege, it should have been accorded to the defendant on his demand. So that *quacumque via data*, this objection is fatal to the conviction.

The only remaining question, which I deem it proper to consider, is, whether the act in question, so far as it purports to prohibit intoxicating liquors to be used as a beverage, is valid? The objection urged against that feature of the act is, that it is an exercise of despotic power, calling for an unconstitutional interference with the *rights of property*. All civilized nations agree in asserting the rights of property, and holding them

sacred, as essential to the prosperity and happiness of man. Sir *William Blackstone* says, (2 *Com.* 2,) that "there is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property, or that sole and *despotic dominion* which a man claims, and exercises, over the external things of the world, in *total exclusion* of the right of *any other individual* in the universe;" and Chancellor *KENT* well remarks, (2 *Com.* 319,) that "the sense of property is generously bestowed on mankind for the purpose of rearing them from sloth and stimulating them to action; and so long as the right of acquisition is exercised in conformity with the social relations, and the moral obligations which spring from them, it ought to be *sacredly protected*. The natural and actual sense of property pervades the foundations of social improvement. It leads to the cultivation of the earth, the institution of government, the establishment of justice, the acquisition of the comforts of life, the growth of the useful arts, the spirit of commerce, the productions of taste, the creations of charity, and the display of the benevolent affections."

There are, undoubtedly, visionary theorists, who advocate the community of property in small societies; but the general sense of mankind indicates that civilized society cannot exist when the right to separate and distinct property does not prevail, or is not *sacredly protected*. The people of this state have shown their appreciation of the rights of property, in their organic law, by declaring, (*Art.* 1, *p.* 6,) that "no person shall be deprived of life, liberty, or property, without due process of law." We are thus as effectually protected in the enjoyment of our property as of our lives or our liberty.

The protection given to property, as well by the sense of mankind as by positive enactment, makes no distinction as to its greater or less utility. It extends to whatever has been held and enjoyed as such, by custom and usages of the country. No power is given to any man, or body of men, to discriminate. We hold our property independently of the varying, and sometimes capricious, estimates of our fellow men. So universal has been the sentiment in favor of the right, and the determination to support it, that

the act in question is, with a single exception, the only instance of an attempt to legislate any species of property substantially out of existence. The exception to which I allude, is the original abolition of slavery by statute. That institution, however, did not exist, nor were slaves considered as property, at common law. If they had been, it might have been a grave question, whether their owners could have been deprived even of such property without compensation. But, at any rate, that was an extraordinary case, having reference to what was generally admitted to be the original rights of man, which the statute was destined to enforce, and cannot be considered as a sanction for the violation of the constitutional protection of property. The protection of any species of property must necessarily extend to its essential and definitive characteristics, especially those which constitute its main value. Otherwise it might be rendered useless in the hands of the possessor, and its protection would be wholly illusory.

One of the essential characteristics of property is its vendibleness, especially for the principal use to which it can be appropriated. That necessarily results from the despotic dominion over it which *Blackstone* ascribes to the possessor. Chancellor KENT says, (2 *Com.* 310,) "that the exclusive right of using and transferring property follows as a natural consequence from the perception and admission of the right itself;" and for this he quotes *Grotius*, (b. 2, ch. 6, § 1.) And again the same learned commentator says, (p. 320, vol. 2,) "The power of *alienation* of property is a *necessary incident to the right*, and was dictated by mutual convenience and mutual wants." This is so entirely in accordance with the general sentiment of mankind, and the universal practice, that it cannot be disputed. So far as my information or recollection extends, the present is the first and only attempt to interfere with, and prevent the general right of sale of any species of property. That the manner of selling it may be regulated, so long as the right is essentially preserved, there can be no doubt. It is upon this principle that our former laws regulating the sales of spirituous liquors were passed. They were, however, by no means pro-

hibitory of the right. Every man was at liberty to sell in quantities exceeding five gallons, and a selected class in any quantity. Upon the same principle sales at auction of goods generally, sales by pedlers, and sales by apothecaries of poisonous drugs, have been regulated, and sales of deteriorated and unwholesome provisions have been prohibited. These were merely police regulations, and it did not interfere with the ordinary sale of any property in its appropriate condition. So, too, it is competent for the legislature to prohibit the abuse of property, so as to make it peculiarly dangerous or deleterious to society.

It is upon this principle that laws have been passed to prevent the storing of gunpowder in cities, to regulate the construction of buildings, so as to prevent unnecessary exposure of lives in crowded places, and to suppress gambling in lotteries or otherwise. In none of these instances is there any interference with the ordinary use of property. There is also a power to prevent or abate nuisances. But to that there must necessarily be a limit. It cannot be extended to the general destruction of any species of property, or of its organic characteristics. If it could go thus far, none would be safe. The use of animal food, tea, coffee, and fruits, each of which is considered by many to be deleterious, might be prohibited. As the legislature has confessedly the power to adopt police regulations, so as to prevent the abuses of property, it may be asked, where are the limits to which it can legitimately be applied, and by whom are such limits to be prescribed? It may be very difficult in many cases to draw the line, but that can be no reason for claiming an unlimited power. *The right is simply one of regulation, not of destruction.* When an enactment is clearly destructive of a right, and not simply reformatory of its abuses, there can be no question as to its invalidity. There is no reason for claiming discretionary power in such cases. That can be invoked only in cases of doubt. It can be no sufficient reason for acting clearly wrong in any particular matter, that the exact line of separation between the right and the wrong cannot be easily defined.

Upon the whole, my impression is, that the right of property

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extends not only to its corpus, *but to its ordinary and essential characteristics*, of which the right of sale is one; and that it can be controlled only so far as to prevent its abuse, without destroying such characteristics.

It must be conceded, that an unlimited and unrestricted power to take the life, the liberty, or the property of our fellow man, is despotic. And it matters not whether it is lodged in the hands of one or many, or whether the depositories are elective or hereditary, the character is the same. It was contended, on the argument by the counsel for the people, that the legislature of this state possess despotic legislative power, by reason of the general constitutional grant. To that I cannot assent. It is undoubtedly true, that absolute power exists originally in the people constituting a distinct and separate community. It is competent for them to establish for themselves a despotic government in one man, or many men, if they should choose to do so, although an intention to confer absolute power can never be inferred, and certainly not in a country claiming to be free. But the people of this state, when they entered the Union, deprived themselves of the power of establishing any other than a republican form of government. (*Const. of the U. S.*, art. 4, § 4.)

There is not, perhaps, any very accurate description of a republican form of government; but it is generally understood that it cannot be subject to a despotism in any of its public functionaries. The man who is the subject of despotic power, and I care not whether it be in the legislative or executive department, is a slave, and not a republican. Liberty and despotism can never exist together. No general grant would confer an unlimited power over the lives, the liberty, or the property of the citizen. It was well remarked by Judge STORY, in *Wilkinson agt. Leland*, (2 Pet. 657,) that "the fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—

lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people."

And Judge BRONSON said, in *Taylor agt. Porter*, (4 Hill, 145,) "The security of life, liberty, and property lies at the foundation of the social compact; and to say that the grant of legislative power includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the government was established. If there was not one word of qualification in the whole instrument, I should feel great difficulty in bringing myself to the conclusion that the clause under consideration," (conferring legislative power in general terms,) "*clothed the legislature with despotic power. Neither life, liberty, nor property, except when forfeited by crime, or when the latter is taken for public use, falls within the scope of the power.*"

But, as I have already remarked, the constitution of this state provides expressly that no person shall be deprived of life, liberty, or property, without due process of law. This provision is general, and applies to, and of course limits the power of the legislature. That body can no more deprive any one of his property, without due process of law, than can a private individual. An act of the legislature is not the due process of law mentioned in the constitution. Those words, as was remarked by Judge Bronson in the case last cited, "cannot mean less than a prosecution, or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property." In other words, a man cannot be legislated out of his life, liberty, or property.

That intoxicating liquors were property at the time of the adoption of our state constitution there can be no doubt. They had been for many ages in general use, as well by the prudent and the virtuous as by the reckless and the vicious. To have denied to the farmer his cheerful glass of cider, or to the laboring man, when worn down with fatigue, the support of his customary restorative, would have excited as much astonishment,

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and created as much resistance in the old time, as would the denial of tea or coffee to our ladies at the present day. Whether those who have gone before us, including the greatest, wisest, and best of their days, were right in thus indulging their tastes, or whether their conduct was indiscreet, and deserved to be characterized as *criminal*, according to the opinion of modern reformers, are not questions for the consideration of the judiciary. I allude to the former practice to show that intoxicating liquors were property with the general assent of mankind.

It was said by Chief Justice TANEY, in the license cases from Rhode Island, New-Hampshire, and Massachusetts, (5 *Howard*, 577,) that "spirits and distilled liquors are *universally admitted* to be subjects of *ownership* and *property*, and *therefore* subjects of *exchange*, *barter*, and *traffic*, like any other commodity in which a right of property exists:" and CATRON, J., remarked, in the same cases, that "*ardent spirits have been for ages, and now are subjects of sale, and of lawful commerce, and that of a large class throughout the civilized world, is not open to controversy.* So our commercial treaties with foreign powers declare them to be, and so the dealings in them among the states of this Union recognize them to be." That such liquors are property still admits of no doubt. Their importation from foreign countries is expressly sanctioned, and they are heavily taxed by congressional legislation.

If the acts of congress had been legitimately passed by the legislature of this state, we should have been virtually precluded from denying the characteristics of property to what we had directly admitted within our borders and subjected to taxation. The faith of states, which should ever be preserved inviolate, would have forbidden it. We are equally, though possibly not as directly, included by the acts of a general government, of which, by our own volition, we are a member. Intoxicating liquors are still freely admitted and heavily taxed; and their sale by the importer while in the cask or vessel in which they were introduced into the country, and their purchase by any one, are authorized beyond the reach of state legislation. It is true, that their subsequent sale was, at the time of the adoption

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of our state constitution, subject—and no doubt lawfully subject—to the regulations contained in our excise laws. The supreme court of the United States has decided, on various occasions, that state laws regulating sales of intoxicating liquors are not prohibited by the constitution or laws of the United States. Some of the judges, in the license cases from three of the New England States to which I have alluded, expressed opinions that state laws prohibiting entirely intoxicating liquors, might not conflict with the powers conferred upon, and exercised by the general government; but the decision of that question was unnecessary, as it was admitted by the judges that the statutes of those states were not prohibitory.

The remarks of those learned judges, as to the right of the states to pass laws prohibiting the sale of foreign liquors, had no reference to the limitation of the power of the legislature of the states by their own constitutions; and besides, they were mere *obiter dicta*, as they were upon a question not at all involved in the cases before them, and would not, according to a rule they had laid down for their own conduct, at all control them, or the court of which they were members, in any future determination. From the considerations to which I have alluded, I have no doubt but that imported liquors are still, as they always have been,—property.

As to liquors of domestic origin, there are other and, possibly, more difficult questions. The control of the state over them has not been, nor, unless they are introduced from other states, cannot be, subject to congressional legislation. Whether it is competent for the legislature to prohibit their manufacture in this state is not now a question, as that has not been done. They can yet be lawfully manufactured, and, when manufactured are still property; and as such are, equally with imported liquors, protected by the ægis interposed by our state constitution.

It is clear, as I have before intimated, that the protection to property extends to and includes its generally conceded characteristics, especially those without which it would be valueless; otherwise it would be but nominal, and scarcely that. It was

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contended, however, by the counsel for the people, that the sale of intoxicating liquors was not prohibited by the statute; that any of them might be sold for medicinal, manufacturing, and sacramental purposes; and that foreign liquors might be sold by the importers, in the original cask or vessel, to any one. The permitted sales would be very inconsiderable. And the statute, if carried into full, and its designed, operation would effectually prevent its use, as an ordinary beverage, by the great mass of the people—the use for which it was mainly designed, and without which it would be of little or no value. It might be accessible to the wealthy, but would be unattainable by men of moderate means. That would create a distinction between the rich and the poor, which should ever be avoided in legislation—if it is desirable that our laws should be respected or enforced. It is no matter what may be the pretence, the denial would be a restriction; and that to be just, should operate upon all; if not equally, the inequality should not be the direct and palpable effect of the statute. I consider the statute in question as mainly prohibiting the sale of intoxicating liquors as a beverage, and destructive of its principal value; and with that impression I must adjudge it to be null and void to that extent.

The inviolability of the rights of private property is subject to the prerogative resulting from the eminent domain always existing in the sovereign power to take it for public purposes, on paying an adequate compensation to the owner. But the compensation must consist of a direct and specific remuneration, and not merely of the general good conferred upon the community by the passage of a beneficent law. The Prohibitory Law does not, nor from the nature of the case could it, make any direct compensation to the owners for the property which it is proposed to sacrifice.

So, too, there is necessarily reserved the right of taxation; but the exercise of such right, although it requires the contribution of a portion of what belongs to the citizen, in effect rather increases than diminishes the value of the entire property, by

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the security which it enables the public to give to all that is retained.

The interest in the question as to the validity of the Prohibitory Law is not confined to those only who may own the property which it is proposed, in effect, to render unavailable to the proprietor. It extends to the entire community. If the shield of constitutional protection can be withdrawn from one species of property, any other may be successfully assailed under some specious pretences, or indeed without any at all. It is by no means a sufficient answer to this, to say that the power over property, which is now claimed in behalf of the legislature, would not be liable to abuse, as the members are elected by the people, with whom they retain a community of interests, as they enjoy but a short term of office, and must soon return to the ranks of private life.

The patriots of the Revolution, who framed our national constitution, and the enlightened members of the convention who adopted our state constitution, thought otherwise, and accordingly limited the power of the legislature expressly in several important particulars, and by implication in many others. They no doubt thought, and rightly thought, that the possession of despotic power by any department of our government would be inconsistent with our free institutions, and that the safety of our lives, our liberty, and our property, required that they should not be subjected to the arbitrary disposal or control of any man, or set of men.

It may be, that the ordinary use of intoxicating drinks necessarily leads to their frequent abuse, and that the interests of society require that property in them should be, in effect, annihilated. If so, they might, and possibly should, be withdrawn from the pale of constitutional protection. But that has not yet been done, nor can it be done by any other power than that by which our organic laws were ordained. Whatever those institutions require, the court must award, as it is the duty of the judges, imposed upon them by their official position, and under the solemnity of an oath, to support the constitution of

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our common country, and of our own state, from whatever quarter, or under whatever pretence, they may be assailed.

I have not the slightest wish to extend any protection or encouragement to the habit of inebriation, or to throw any impediment in the way of the good and the virtuous, who are so solicitous to arrest its progress. It is an abomination, and should be suppressed (so far as human means can do it) by precept, by example, and by legitimate legislation. But we should go no further, lest we "do evil that good may come." The injunction against that is wise; as the evil is certain, while the production of the good might be, at least, problematical.

The judgment in the court below being erroneous, it must be reversed.

ROCKWELL, Justice—*dissenting in part*. The defendant (Berberich) has been convicted before a court of special sessions held by the county judge of Dutchess county, of having sold intoxicating liquor in violation of the act for the prevention of intemperance, pauperism, and crime, passed April 9, 1855. It is claimed that the defendant should be discharged from custody.

1. Because so much of the said act as prohibits the sale of intoxicating liquor is void. That such prohibition is an unauthorized invasion of private rights, and a violation of the fundamental law.

It is clear that under every free government there are certain fundamental and inherent rights belonging to individuals which are not solely dependent upon the will of the legislature; and it is unnecessary to examine the written constitution of the state to ascertain whether they are expressly shielded by that instrument from legislative encroachment. The right of personal security, or personal liberty, and private property, do not depend upon the constitution for their existence. They existed before the constitution was made or the government was organized. These are what are termed the absolute rights of individuals, which belong to them independently of all government, and which all governments, which derive their powers from the

consent of the governed, were instituted to protect. They are defined as follows :—

“ By the absolute rights of individuals, we mean those which are so in their primary and strictest sense, such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it.”
(1 *Black. Com.* 123.)

But while these rights are better protected, they are not as entirely absolute under government as in a state of nature. They are subservient to such measures as become necessary for the preservation of the government, its defence against external or internal enemies, or the promotion of the best interests of the whole community. For the protection of the government against external danger, individuals may be compelled to enter the military service, and to subject and expose themselves to the hardships and perils of war. For the protection of society against the consequences of crimes, offenders may be deprived of liberty, property, or life. Lunatics, who become dangerous to others, may be imprisoned. Persons sick of contagious diseases, may be removed to, and placed in hospitals. Property may be removed or destroyed, or trades suppressed, which endanger the public safety or health. Property may be taken from individuals in the form of taxes, and applied towards the support of the government and its institutions. In short, government is not to be restrained in the exercise of its legitimate powers, which are essential to the public welfare, because the rights of individuals will be injuriously affected thereby.

In cases where private property is directly and specifically taken for the public use, compensation must be made to the owner. But cases are constantly occurring where individuals are subjected to great and ruinous losses of property through the operation of public measures and laws; but these losses being merely consequential and incidental to the exercise of the legitimate powers of the legislature, the individual injury is not the subject of legal redress. Individual loss frequently results from the grading of streets, the construction of canals, bridges, ferries, railroads, and similar improvements; but if the

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law-making power, in the exercise of its legitimate discretion, decides that such improvements are conducive to the public good, no individuals, whose injuries are consequential merely, will be permitted to arrest the action of the government, or will even be entitled to compensation for the injury which he may sustain. (*Radcliff's Executors agt. The Mayor, &c., of Brooklyn*, 4 Com. Rep. 195.)

We may assume, for the purpose of this case at least, that the legislature of a free state is not competent to pass a tyrannical law. That is, one which restrains the natural rights of individuals for any other purpose than to advance some public good, or to repress some public evil. The distinction between laws which are tyrannical, because they unnecessarily infringe upon the absolute rights of individuals, and those which are consistent with civil liberty, although in restraint of natural liberty, is very clearly pointed out by *Blackstone*, as follows:—

“Political or civil liberty, which is that of a member of society, is no other than natural liberty, so far restrained by human laws (and no further) as is necessary and expedient for the general advantage of the public. Hence we may collect, that the law which restrains a man from doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny; nay, that even laws themselves, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty; whereas, if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance, by supporting that state of society which alone can secure our independence.” (1 *Black. Com.* 125.)

There is no doubt but that a great number of individuals will sustain a serious loss of property and derangement of business through the operation of the prohibitory feature of the law in question. But this consideration is not decisive of the ques-

tion of legislative competency. The question still remains—Was the passage of the act an exercise of the legitimate discretion and power of the legislature, founded upon considerations of public policy, tending to promote the morals, the health, and safety of the community, or was it a mere wanton and unnecessary invasion of the private rights of individuals?

Any interference with the right of property is not the primary object of this law. Its object is, to prevent intemperance, pauperism, and crime. Surely these are proper subjects of legislation. A law aiming at the prevention of these evils by regulating, and, to a certain extent, prohibiting the sale of intoxicating liquor, has long existed as one of the police regulations of the state. The present law assumes that the former law has been found insufficient to accomplish the ends for which it was designed. That the regulation of the sale of intoxicating liquor having failed to suppress intemperance, pauperism, and crime, and the public evils flowing therefrom, it has become necessary to try what virtue there is in prohibition.

Whether the law can be carried into effect, whether the whole result will not be a mere legislative enactment of prohibition, without the power of enforcing it practically, whether the evils at which the law is pointed will not be aggravated instead of suppressed, are matters addressed solely to the discretion of the legislature, and with which the judicial branch of the government has no concern.

The objects of the law are matters in which the whole community are interested. Drunkards, paupers, and criminals are burdens upon the public, enemies to the peace, welfare, and happiness of society. Can it be doubted, that if the traffic in intoxicating liquor was entirely suppressed, their number would be greatly diminished?

It is enough to uphold this law, that its tendency is to prevent the public evils against which it is directed, and to promote the public benefits which it is designed to reach. It is not difficult, by ignoring the whole object and purpose of the law, to make out a very plausible case of legislative encroachment upon private rights. But this is not a just or fair mode of considering

it. The great ends of public policy which it was intended to subserve, are clearly within the scope of legislative competency. The public evils which it was intended to suppress are the most formidable to the peace and welfare of society which those who make or administer the laws are called upon to encounter. Assuming that the legislature have acted in good faith, that they have not wantonly and unnecessarily invaded private rights, under the mere pretence of preventing public evils, I think the question, whether the public benefits are of greater weight or importance than the individual losses which will result from the prohibition of the sale of intoxicating liquor as a beverage, is one of legislative discretion, and with which the judiciary has no concern. It was for the legislature to determine to what extent it was necessary to interfere with private rights in order to accomplish the great ends of public policy which they had in view; to array on the one side the serious loss of property, and derangement of business which must ensue from the passage of this law, and on the other the appalling statistics of intemperance, pauperism, and crime, and then determine whether the public necessity was sufficiently urgent to justify the individual wrong.

But it is further claimed that the defendant should be discharged from custody.

2. Because it does not appear, from the complaint under which he was arrested and convicted, that he sold liquor which was not imported. That, by the true construction of the exception at the close of the first section of the act, the unrestricted sale of all imported liquor is permitted. The language of this exception is as follows:—

“ This section shall not apply to liquor, the right to sell which in this state is given by any law or treaty of the United States.”

It is said that, as this clause occurs in a penal statute, and is a part of the definition of the offence which it is the intention of the law to prohibit and punish, it must be *strictly* construed. This may be so; but a *literal* construction of the clause will render it entirely nugatory. The rights of those whose inter-

ests are protected by the exception forbid such a construction. There is no law or treaty of the United States by which the right to sell any description of liquor is *given* directly or indirectly. The right to sell liquor, or other property, is not given by any law of the United States or the state of New-York. It exists as a necessary incident to the right of property, independently of any positive law. It has been held by the courts of the United States, that the right to sell liquor of a certain description, and in a certain condition, is *secured* by the operation of certain laws of the United States against any restraint of the right of sale by state legislation. That is to say, when the act of congress authorizes the importation of liquor, the right of the importer to sell it results as a necessary incident to the right to import, and is secured to him against any interference on the part of the state legislature, by the paramount authority of congress. The question then is, what description of liquor is it, the right to sell which, notwithstanding any prohibition by the laws of this state, is derived from, or secured by the act of congress? It is imported liquor, in the casks or packages in which it was imported. The exception from the prohibition is exactly co-extensive with the right to sell secured by the act of congress; and the exception was plainly and solely intended to avoid a conflict between the state and federal laws. Any other construction would be so totally at variance with the whole spirit, scope, and intention of the entire law, as in my judgment to be utterly inadmissible.

The rules by which the sages of the law have ever been guided in seeking for the intention of the legislature, are maxims of sound interpretation, which have been accumulated by the experience, and ratified by the wisdom of ages. (*Plowden's Rep.* 205.)

The resolutions of the barons of the exchequer, in *Heyden's* case, were the following:—

“For the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered :

"1. What was the common law before the making of the act?

"2. What was the mischief and defect against which the common law did not provide?

"3. What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth?

"4. The true reason of the remedy. And it was held to be the duty of the judges, at all terms, to make such construction as should suppress the mischief and advance the remedy, putting down all subtle inventions and evasions for continuance of the mischief, *et pro privato commodo*, and adding force and life to the cure and remedy, according to the true intent of the makers of it, *pro bono publico*." (3 Reports, 7.)

Surely, we are not called upon to reverse these admirable rules for the construction and interpretation of statutes, and so to construe this act as will certainly and clearly advance the mischief which it was intended to suppress, and suppress the remedy which it was intended to advance.

It is further claimed, that the defendant is entitled to his discharge.

8. Because the proceedings against him were in violation of law, and void. I can perceive no substantial error in these proceedings, down to the time when the defendant was brought before the county judge upon the warrant issued by that magistrate for his arrest.

He then demanded that his examination should be taken, and offered bail for his appearance at the next court of sessions of Dutchess county. This was refused, and he was therefore tried and convicted before a court of special sessions, held by said county judge. In refusing an examination, or to take bail for the appearance of the defendant, I think the county judge committed an error which was fatal to the validity of all the subsequent proceedings against the defendant. The examination of the defendant should have been taken by the county judge; and if, upon the examination of the whole matter, it appeared either that no offence had been committed, or that there was no probable cause for charging the defendant there-

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with, he should have been discharged. If there was probable cause to believe the defendant guilty, bail should have been taken, if offered by the defendant, for his appearance at the next court having cognizance of the offence. (2 R. S. 708, 709, 710.)

A court of special sessions is one of limited jurisdiction, deriving all its powers from the statute. It could only acquire jurisdiction over the person of the defendant upon his request to be tried before it, or his omission for twenty-four hours after being required to do so, to give bail for his appearance according to law. (2 R. S. 711, 712.)

I think the conviction of the defendant was void, and does not authorize his detention in custody.

SUPREME COURT.

VINE GROSVENOR agt. WILLIAM HUNT.

Where a judgment was recovered in an action in this court for slander, from which judgment the defendant appealed to the general term, and afterwards the parties, by an agreement in writing, and mutual bonds of submission, setting forth the pendency of the action, the trial thereof, and the appeal, submitted the *action* to the decision of certain persons named as arbitrators,—*held*, that all the legal proceedings were discontinued and ended by the submission, and the judgment could no longer be proceeded upon.

The defendant having revoked the submission, and a motion being made for an attachment against the sheriff for not returning an execution on the judgment, pursuant to a notice served on him,—*held*, that the sheriff could not avail himself of the submission as an answer to the motion; that the execution was not void, but only voidable, and that the right to avoid it was personal to the defendant, whose remedy was by motion to set aside the execution, or for a perpetual stay of proceedings.

Monroe Special Term, October, 1854.

MOTION by the plaintiff for an attachment against the sheriff of Monroe county for not returning an execution.

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The plaintiff recovered a judgment against the defendant in an action for slander, and issued an execution on the judgment. The defendant then appealed from the judgment to the general term; after which the parties, by an agreement in writing, and mutual bonds of submission, setting forth the pendency of the action, the judgment, and the appeal, submitted the action to the determination of certain persons named as arbitrators. On the parties appearing before the arbitrators, who had assembled for the purpose of the hearing, the defendant revoked the submission. The plaintiff then served a notice upon the sheriff to return the execution, which has not been complied with, and an attachment against him is now applied for.

E. GRIFFIN, *for plaintiff.*

BENEDICT & MARTINDALE, *for sheriff and defendant.*

T. R. STRONG, Justice. The general doctrine, that a mere submission to arbitration of an action depending in court, without any provision that judgment may be entered on the award, is a discontinuance of the action, is well settled. (*Ressequie agt. Brownson*, 4 Barb. 541, and cases there cited.) The ground upon which the doctrine rests is, that the parties have selected another tribunal—one of their own creation, to settle the controversy. (*Same cases.*)

It is conceded by the counsel on this motion, on both sides, that the submission between the parties, referred to in the papers, was a discontinuance of the appeal therein mentioned; and that is undoubtedly correct. But the defendant's counsel insists that it was also a discontinuance of all legal proceedings between the parties from the commencement, and operated to set aside the judgment. On the part of the plaintiff it is contended that the appeal only was discontinued. The submission consists of an agreement of submission, and also of mutual bonds of submission. The agreement recites that "a controversy is now existing and pending in the supreme court," &c., in relation to slander, which action has once been tried, and a verdict and judgment rendered therein in favor of the plaintiff; that

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the defendant has appealed to the general term; and then states that the parties do submit the controversy to the persons named as arbitrators, and agree to abide by the award, provided it be made, &c., by a specified time. The bonds are conditioned, that the obligor shall submit to the award of three persons named, selected as arbitrators to arbitrate "of and concerning an action of slander," &c., "which cause is now appealed to the general term," &c. It is apparent from the language used in these papers, that it was the intention of the parties to submit the subject matter of the action for the slander, and the action itself, including the appeal; the whole controversy between them from the commencement. The judgment was not to conclude, or have any effect, in regard to the merits of the controversy, but the arbitrators were to take up the matter from the beginning. No doubt, it appears to me, can exist in regard to this. It would be absurd to suppose, in view of the terms employed, that the parties designed the judgment should retain the ordinary conclusive force of a judgment, and that the arbitrators were to be limited to the questions upon the appeal. And if the construction I have given to the agreement be the true one, it would seem to follow that all the legal proceedings which had been taken were discontinued and ended, and deprived of force by the submission, as well as any part of them. I do not perceive any principle upon which a distinction can be made between any portions of them.

In *Van Slyke* agt. *Lattice*, (6 *Hill*, 610,) after an appeal to the common pleas had been taken from a judgment in a justice's court, the parties submitted "the matters at issue between them in the suit pending in the common pleas" to arbitrators; and it was agreed between them as follows: "all future proceedings in said suit at law are to be hereby stayed and ended, and the award or determination of the said arbitrators in the said matter is to be final." The arbitrators did not agree upon an award—an action was brought in the common pleas upon the judgment before the justice, and the submission was set up as a bar; but the plaintiff recovered, and the defendant brought a writ of error. The court say, at the conclusion of the opinion

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in the case, "These parties intended to blot out and end the *suit at law*, from its commencement before the justice to its termination in the common pleas, by the substituted arrangement to arbitrate;" and the judgment below was reversed. It is true, the court in that case place much stress upon the *express* agreement, that proceedings in the suit should be ended. But it is in distinguishing the case from a former one (*Miller agt. Van Auken*, 1 *Wend.* 516) similar to it, with the exception that in the latter there was, beyond a submission of the cause, a clause in the bonds, that the appeal to the court of common pleas should be, and was thereby discontinued, without saying anything about a discontinuance of the proceedings before the justice. In that case it was held the justice's judgment remained in force. I understand the decisions in both cases to be controlled by the intention of the parties, as manifested by their agreement. In the former it was palpable they intended all the legal proceedings should be at an end; in the latter, by expressing that the *appeal* was to be terminated, it might be inferred they intended the proceedings before the justice should be suspended merely, and that the judgment might be enforced if no award should be made.

In the present case it is as clear, from the submission, that it was intended the proceedings in the action, including the judgment as well as the appeal, should be ended, as if the parties had said so in express terms. The legal proceedings from the first were to be blotted out. Another tribunal was selected for the entire controversy. The doctrine that a submission works a discontinuance of an action, does not depend upon an express agreement that the action shall cease: such an agreement is implied in all cases, from the selection of another mode of adjustment and settlement of the litigation.

The bonds of submission in this case express that the action is submitted. Under the general doctrine referred to, the action is discontinued. The *action* embraces all the legal proceedings. An appeal is but a step taken in the action. (*Brockway agt. Jewett*, 16 *Barb.* 598, and the cases there cited.)

There is an apparent injustice in allowing the defendant thus

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to avoid the judgment against him; but the right of revocation was an incident to the submission, which it belonged to the parties to consider on entering into the submission. The plaintiff might have revoked, and, if the judgment was not ended by the submission, have thereby deprived the defendant of his right to appeal, after the time to appeal had expired, and gone on and enforced his judgment. That apparently would have been gross injustice. In both cases, however, the injustice is only apparent; each party has an ample remedy on his bond, and by occupying his original position in respect to the cause of action.

The question considered having been discussed on the argument, and subsequently examined by me, I have thought proper to express my views in relation to it, although I have come to the conclusion upon another point, that the motion must be granted.

The sheriff cannot avail himself of the submission to arbitration, as an answer to proceedings to compel a return of the execution. The execution is not, by reason of the submission, void; it is only voidable; and the right to avoid it is personal to the defendant. His remedy is by motion to set aside, or for a perpetual stay of proceedings on the execution. Upon such a motion, the plaintiff can present such facts as he thinks proper and pertinent in resisting it; he was not called upon in this proceeding to anticipate, and be prepared to meet such an objection. In the present case, it is not suggested that any answer exists which has not been made; but the plaintiff is entitled to the application of the general rule of practice, which sends a party in such cases to an affirmative application. (*Ontario Bank* agt. *Hallett*, 8 Cow. 192; *Orange County Bank* agt. *Dubois*, 21 Wend. 351.)

The motion for an attachment is granted, with a stay of proceedings for ten days, to enable the defendant to prepare papers and give notice of a motion for relief, and obtain a further stay of proceedings with a view to a motion. /

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SUPREME COURT.

MALTBY G. LANE agt. SIMEON LOSEE and others.

The last paragraph of subdivision 5, section 244 of the Code, says, "When the defendant admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim, *and may enforce the order as it enforces a provisional remedy.*"

Now, the question is, does this provision apply where the defendant admits part of the plaintiff's demand, *arising upon an ordinary civil contract*—as upon a promissory note.

Held, not. The provision in question cannot affect any demand, or any part of a demand arising upon contract, where such contract is within the meaning of the first section of the act of 1831, abolishing imprisonment for debt. Otherwise imprisonment for debt is reinstated, and the act of 1831, in part at least, repealed by indirect implication.

At Chambers, New-York, September, 1855.

THIS was an action against the makers of promissory notes, amounting to \$1,667.84.

The defendants, without denying the demands, claim a set-off for money laid out and expended, and work and labor, amounting to \$150, tacitly admitting a balance due to plaintiff of \$1,517.84.

The plaintiff now moves, under the last paragraph of subdivision 5, section 244, of the Code, that the defendants may be ordered to satisfy that part of the demand thus tacitly admitted, and that the court enforce the order as it enforces a provisional remedy: that is, by commitment, as for contempt.

NILES & BAGLEY, *for plaintiff.*

I. T. WILLIAMS, *for defendants.*

CLERKE, Justice. It will be seen, that the only relation subsisting between the parties in this action is the ordinary one of debtor and creditor. Does the section in question apply to this relation? Were we permitted to regard the paragraph isolated, and detached from the Code, and the statutes remain-

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ing in force, the language in which it is expressed may seem to warrant the construction which the plaintiff maintains.

It says, "When the defendant admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim, and may enforce the order, as it enforces a provisional remedy:" that is, it may commit the defendant as for a contempt, if he should not pay the portion of the demand which he admits to be just. But, however apparently plain this language may be, when the paragraph is considered alone and detached, there are, I think, insuperable objections to the construction which the plaintiff has urged upon the court.

1st. In the first place, such a construction would be most manifestly at variance with the spirit and policy of our legislation for nearly a quarter of a century, and with the uninterrupted current of public opinion during that period.

It would subject a party to imprisonment for a mere debt, in direct contravention of the act passed on the 26th of April, 1831, expressly for the purpose of exempting all persons from imprisonment in any suit or proceeding instituted for the recovery of money due upon any judgment or decree, founded upon contract, express or implied, or for the recovery of any damages for the non-performance of any contract, except actions on promises to marry, and other cases not within the range of ordinary contracts—such as actions for fines and penalties, or for moneys collected by any public officer, or for any misconduct or neglect in office, or in any professional employment.

If this construction, however, can be sustained, imprisonment for debt is reinstated in our statute book, notwithstanding this act, and in spite of public opinion, and the whole tenor of legislation on this subject.

2d. This construction would be an indirect repeal, in part at least, of the act of 1831, abolishing imprisonment for debt. But can a statute, particularly a statute of this benignant character, in favor of human liberty, and abrogating a barbarian usage, be repealed in this way.

An old statute, indeed, gives place to a new one; but this

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is to be understood only when the latter statute is couched in negative terms, or when its matter is so clearly repugnant that it necessarily implies a negative.

The invariable rule of construction in respect to the repeal of statutes by implication is, that the earliest act remains in force, unless the two are manifestly inconsistent with, and repugnant to each other, or unless by the latter act some express notice is taken of the former, plainly indicating an intention to abrogate it.

As laws are presumed to be passed with deliberation, and full knowledge of all existing ones on the same subject, it is reasonable to conclude that the legislature, in passing a statute, did not intend to *interfere* with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable. Hence a repeal by implication is not favored. (*Bowen agt. Lease, 5 Hill, 225.*)

3d. The construction contended for presents an anomaly, which neither law nor reason favors. It will be remembered, that in the case before us, the admission by the defendant of *part* of the claim is not express, but implied, precisely like an admission of the whole demand, where a defendant allows judgment to go against him by default. This, in fact, is a default against the defendant for a part instead of the whole. Now it will not be pretended, if he put in no answer, and allowed judgment to be entered against him by default on the whole demand, that the remedy now sought for could be applied; it would be too palpable an attempt to override the act of 1831. And yet it is gravely contended that this very thing can be done when only a part of the demand is admitted; a demand arising upon the most ordinary and familiar of all contracts—promissory notes. This is an absurdity, a contradiction, which the legislature could not have intended to place upon the statute book. To allow imprisonment for a fragment of a debt while they had abolished it as a remedy for the whole, is an anomaly which it cannot be supposed any legislative body could have contemplated.

For these reasons, therefore, I cannot believe that the pro-

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vision in question affects any demand, or any part of a demand, arising upon contract, when such contracts are within the meaning of the first section of the act of 1831.

We find it under chapter five of the Code, entitled "Provisional Remedies," belonging to Title VII, entitled "Of the Provisional Remedies in Civil Actions." The second chapter of this title relates to the claim and delivery of personal property: provides the method, by which a plaintiff claiming *specific* property can have it delivered to him before or after judgment.

The provision, which is the subject of discussion in this motion, is the last of the three paragraphs appended to the 5th subdivision of § 244. They are not numbered, and are introduced in a loose and informal manner, very unusual in the Code; and I am strongly inclined to suspect that they have got into the wrong place.

The first of these paragraphs provides, when a party admits that he has in his possession, or under his control, *any money, or other thing, capable of delivery, &c.*, held by him as trustee for another party, or which belongs, or is due to any other party, the court may order the same to be deposited in court, or delivered to the party to whom it is admitted to belong.

This contemplates the admission of the *whole* claim; and I think, plainly relates to *specific property*, whether money, or anything else, that can be traced or identified, which it is alleged the defendant unjustly detains, or moneys which is not the subject of a demand, and arising from the breach of an ordinary contract.

The second paragraph, appended to this subdivision, authorizes the court, whenever it shall direct the deposit, or delivery, or conveyance of money, or other property, and the order is disobeyed, besides punishing the disobedience as for contempt, to make an order requiring the sheriff *to take the money* or property, and deposit, deliver, or convey it, in conformity with the direction of the court.

This evidently also relates to specific money or other property, or money which is not the subject of a demand arising

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from the breach of an ordinary contract. Then comes the provision in question relating to the admission of "a part of the claim," importing also a specific thing; or, if money, not an ordinary money demand, authorizing the court to make the same order as when the whole is admitted, and in like manner to punish the disobedience of the order as for contempt.

In short, I am of opinion that these provisions are intended for cases denoting more flagrant want of fidelity, and consequently greater moral turpitude, than the nonfulfilment of an ordinary contract; it being more probable that the dereliction in the one case originated in fraud; in the other, in misfortune.

In the one, the party is under the most solemn obligations of law and conscience not to risk the loss or deterioration of the property entrusted to his care, and to be ready to account for it at all times; while in the other, the performance of the promise or the payment of the debt, is contingent upon a variety of circumstances, over which the most prudent and upright often have no control.

A person who refuses to restore specific funds entrusted to his custody, or which he has received as an agent, or in any fiduciary capacity, or any other specific thing, which he has possession of, belonging to another, whether as a bailor or otherwise, not only fails to perform a promise, but is disloyal to his trust; and to him, and not to the ordinary debtor, do these provisions apply.

The motion is denied, with costs.

SUPREME COURT.

JAMES CHAPPELL & BYRON D. M'ALPINE agt. HENRY S.
POTTER.

If the rule, that an injunction cannot be issued in one action to stay proceedings in another in the same court, prevails under our present system, it must be confined to cases where the whole object of the injunction would be accomplished by a simple order to stay proceedings.

Where an injunction is proper in reference to part of the subject of the action, there is no good reason why one should not be allowed broad enough to embrace the whole case, if a restraint as to the whole is proper, although as to the residue of the controversy the restraint might be obtained by a mere order to stay proceedings.

In what mode proceedings in a pending action shall be restrained, is matter of practice purely, and where circumstances render a restraint by injunction the most proper, that mode may be resorted to.

Where notes against third persons are turned out as collateral securities for a debt, with the endorsement of the debtor, who afterwards makes partial payments on the principal debt, and subsequently suits are commenced on the notes, and judgments obtained against all the parties, makers, and endorsers, by default; the party who turned out the notes is not concluded by the judgment against him from showing, when sued on the principal debt, or suing to obtain the securities, that less than the amount of the judgment against him as endorser on the collateral securities is due from him on the principal debt.

At Chambers, November 21, 1854.

MOTION to vacate an injunction.

The facts sufficiently appear in the opinion.

W. F. COGSWELL, *for defendant.*

FARRER & DURAND, *for plaintiffs.*

T. R. STRONG, Justice. Upon the plaintiffs' theory of this case, that the judgments and plankroad stock are held by the defendant as collateral security for a sum of money due to him from their assignor, and that he refuses to relinquish the securities to them on being offered and tendered payment of that sum, with the costs of recovering the judgments, this action is properly brought.

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The plaintiffs might obtain a stay of proceedings on the judgments by motion in the actions in which the judgments were obtained; but that is only part of the relief to which they are entitled, even in respect to the judgments. They seek to obtain, and are entitled to the benefit of the judgments as against the principal debtors therein; and they also seek to obtain, and are entitled to the stock.

For the same reason that the action is proper, the defendant should, upon the plaintiffs' application, be restrained from enforcing or disposing of the judgments, or transferring the stock, until the determination of the action, with a view to the relief asked.

It is claimed on the part of the defendant, that this stay of proceedings cannot regularly be by injunction, and that the only correct practice is to obtain a simple order for that purpose by a special motion in the actions in which a stay is desired.

In *Dyckman* agt. *Kernochan*, (2 *Paige*, 26,) the late CHANCELLOR says, that "it is not the practice of this court to permit an injunction bill to be filed, either by parties or privies to the proceedings in a former suit, to restrain proceedings under the decree. The court can control its own process and the proceedings of its own officers, without an original bill being filed for that purpose." He further says, "If any order was proper, the present complainants should have applied by petition to the chancellor." (See also 1 *Hoff. Chan. Prac.* 89, and note 2; 1 *Barb. Chan. Prac.* 619.)

This doctrine has been applied under the Code; and it has been held that an injunction cannot be issued in one action to stay proceedings in another in the same court. (*Dederick* agt. *Hoysradt*, 4 *How. Prac. Rep.* 350.)

If this rule is applicable under our present system, it must, I think, be confined to cases where the whole object of the injunction would be accomplished by the simple order to stay the proceedings. Where, as in this case in respect to the stock, an injunction is proper in reference to part of the subject of the action; or where, as in this case, it is sought not only to re-

strain proceedings to enforce securities, but also the disposal of them, there is no good reason why an injunction should not be allowed broad enough to embrace the whole case. Unless such an injunction is allowable, a party must, in such cases, resort to an injunction in part, and in part to an ordinary order, to obtain the full restraint desired, and proper to be had. This should not be necessary. In what mode proceedings in another action shall be restrained is a matter of practice purely; and, when circumstances render a restraint by injunction the most proper, I think that mode may be resorted to.

The counsel for the defendant insists, that these plaintiffs are concluded by the judgments obtained by the defendant on the securities, other than the stock, against their assignor and the other parties, from alleging that the whole amount of those judgments was not due when they were recovered; and therefore that there is no equity in the plaintiffs' case. I think the assignor of the plaintiffs, upon their view of the case, might have successfully resisted a recovery against him as endorser upon the collateral securities for more than the amount actually due from him upon the principal debt; but I am inclined to think he was not bound to do so in order to protect his rights. There was actually due, upon the collateral obligations, the full amount for which the judgments were rendered; and he might allow judgment against him as endorser to that amount without prejudice to his right, when sued upon the principal debt, to prove that less was due, or to show that a smaller sum was due; and thereupon, on payment thereof, to have the benefit of the judgments. The judgments, like the demands upon which they were obtained, are merely collateral security for the sum actually due the defendant.

Although the defendant in his affidavit avoids the whole equity of the complaint, the affidavits in reply are so full and strong that the injunction cannot be dissolved on that ground.

But I am satisfied that the Revised Statutes, in regard to security to be given upon an injunction "to stay proceedings at law in a personal action after judgment," apply to this case. The defendant claims to be the absolute owner of the judg-

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ments; and the plaintiffs, as assignees of one of the judgment debtors, ask that he be restrained from proceeding to collect them. The case is directly within those statutes. (2 R. S. 189, §§ 186, 191.)

The motion must be granted, unless the plaintiffs, within ten days after service of a copy of the order hereon, deposit in court a sum of money equal to the full amount of the judgments in question, including costs; or execute a bond to the defendant, with two sufficient sureties, to be approved by a judge of this court, or a county judge, in a penalty double said amount, conditioned to pay the amount so required to be deposited, whenever ordered by the court; and unless the plaintiffs also execute a bond to the defendant in the penalty of at least \$500, with like sureties, and to be approved in like manner, conditioned for the payment to the defendant and his legal representatives, of all such damages and costs as may be awarded to him by the court on the final hearing of the cause; and also pay ten dollars costs of this motion. Upon compliance with those terms, the motion to be denied.

COUNTY COURT.

CALEB SMITH, appellant, agt. HORACE SILLIMAN, respondent.

A husband is not liable for goods purchased by his wife, where the credit is given, and the goods are charged to the wife, without reference to the husband, and without his knowledge or assent, even though some of the articles purchased may have been considered *necessaries* for the wife.

Where a justice of the peace passes upon a question of credit, in such a case, as one of fact, his finding ought not to be disturbed on appeal.

Saratoga County Court, March Term, 1855.

THE plaintiff was a dry goods merchant in the city of Troy, Rensselaer county, and had a partner by the name of Bly. They dissolved partnership on the 27th of February, 1854, and

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on the same day one Norton entered into partnership with the plaintiff in the same business, which they carried on until September 20th in the same year, when they dissolved.

It is claimed that Bly, at the time of the first, and Norton, at the time of the second dissolution, assigned to the plaintiff his interest in certain accounts of the firm, which the defendant is liable to pay.

The defendant resides in Waterford, in this (Saratoga) county; has a wife, but no children; owns a house and lot worth about \$500, is a carpenter by avocation, works by the day or month, and his wife "takes in washing and sewing for a living." From July 28, 1853, to May 27, 1854, the defendant's wife purchased at the stores of Smith, and Bly & Smith, and Norton, several bills of goods, amounting in all to \$113.50, on which she had paid \$37, leaving a balance due of \$76.50. The articles purchased were mostly, if not entirely, such as are used for ladies' wearing apparel, or in making such apparel, and consisted of brocade silk, silks of various kinds and prices, delaines, muslins, mulls, merino, calico, a crape shawl, handkerchiefs, gloves, hose, thread, &c. The accounts were charged to Mrs. C. Silliman.

The plaintiff sued the defendant in a justice's court, to recover the balance of the account. The justice rendered judgment for the defendant.

R. A. PARMENTER, *for the appellant.*

No previous dissent of the defendant to the purchase of the goods was proved. His assent must, therefore, be presumed. (*M'Cutchen* agt. *M'Gahay*, 11 *John*. 281; *Blowers* agt. *Sturtevant*, 4 *Den. R.* 46; *Reave's Domestic Rel.* 79.) But the articles purchased were *necessaries*, and the defendant is liable, whether he assented or dissented. (*Kimball* agt. *Keyes*, 11 *Wend.* 33; *Lockwood* agt. *Thomas*, 12 *John*. 248; *Pomeroy* agt. *Wells*, 8 *Paige*, 486; *Watkins* agt. *Halstead*, 2 *Sandford R.* 311; 2 *Cow. Treatise*, (3d ed.,) 149; *Dunlap's Paley on Agency*, 164, VOL. XI.

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(note.) The credit was to the defendant, but the goods were charged to his wife, because his name was not known.

J. C. ORMSBY, *for the respondent.*

The defendant had no knowledge of the purchase of the articles in question. They were too numerous and expensive for one of his rank and circumstances, and were not necessities. (3 *Barn. & Cres.* 631; *Comyn's Dig. Title Baron & Feme*, 2.) But even if the articles were necessities, the credit was given to Mrs. Silliman, and the defendant is not liable. (3 *Campb. Nisi Prius R.* 22, 23; *Shelton agt. Hoagly*, 15 *Conn. Rep.* 335; *Leggett agt. Reed 1 Car. & Payne R.* 16; *Stammus agt. Maccomb*, 2 *Wend.* 454; 2 *Hill (South Car.) R.* 335; 2 *U. S. Dig.* 501.)

M'KEAN, County Judge. The assignments of Bly & Norton to the plaintiff are not made a part of the return, but the justice states that they were delivered to the plaintiff at his request. No question, however, is raised as to the sufficiency of those instruments; and it is fair to presume that they were in due form, and that the plaintiff was the sole owner of the accounts upon which the action was brought.

That a husband is liable upon the contracts of his wife, in regard to matters concerning which it has been usual for him to ratify her contracts, and that he is liable for necessities purchased by her, and is bound to pay for articles which she has bought, when the articles are such as wives in her rank in life usually purchase, are well settled rules of law. In all these cases there is an implied promise on the part of the husband to fulfil his wife's contracts. In the case at bar, there is no proof that the defendant ever ratified any similar contracts of his wife, or that he voluntarily received the benefit of any of the purchases, or even knew of them.

The plaintiff seeks, however, to recover, on the ground that the articles sold were suitable and proper, considering the defendant's rank and condition in life, or were necessities. But, can it be believed that so large an amount of principally fine

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and costly goods purchased in so short a time were necessary or proper, or even becoming for the wife of a man in the defendant's humble, though respectable condition in life? Many of those goods were clearly not necessities. Still, if a married woman should purchase, at a store, various articles conceded to be necessary, and one or more of an extravagant and unnecessary kind, is the whole demand of the merchant against the husband thereby vitiated? Can he not recover for the necessities? Has he no remedy? There are authorities which *seem* to say so; but to hold that the husband is not liable at all in such a case, would be to lay down an unjust rule, and "what is not just is not law," or ought not to be. Some of the articles sold by the plaintiff and the assignors must have been necessities, and for the value of those articles the plaintiff ought to have had judgment, unless there was some other valid objection to a recovery. There is, however, another question to be disposed of. With whom did the plaintiff and his assignors deal in selling the goods in question? With Mrs. Silliman, or with her husband, regarding her as his agent? To whom was the credit given? *Sylvander H. Root* testified, that he was clerk for Smith & Bly, and that Mrs. Silliman's name "was put down through ignorance;" and that the plaintiff inquired for defendant's name, and as to his circumstances *afterwards*. On his cross-examination, this witness said, that the plaintiff asked Mrs. Silliman *her* name, and it was obtained for the purpose of making the charge. "The plaintiff then charged it to her in the book." There is no proof that the plaintiff, or any one else, ever asked her for her husband's name. He asked persons in the store what the defendant's name was, and inquired as to his circumstances; but who they were or where they were from, the witness did not know. This, according to the witness, was after Mrs. Silliman's name was obtained, and the charge made, but how long after, does not appear. The plaintiff was called as a witness by the defendant, and testified that he had known Mrs. Silliman as a customer for some four or five years; that he was formerly a clerk at Quackenbush's, in Troy, and she traded there, and paid for articles

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purchased ; that after the plaintiff commenced business, she began to trade with him, but paid for her purchases until July 28, 1853. It is not in proof how long this was ; but Root was a clerk for Smith & Bly about a year, and they dissolved February 27, 1854.

The plaintiff also testified that he had called on Mrs. Silliman two or three times "about the bill : " did not ask her about her husband : never asked her his name ; but inquired about him in the village ; that whatever had been done in relation to the bills, had uniformly been done with Mrs. Silliman, and that he never saw the defendant until the day of trial. The first time the plaintiff called on defendant's wife was about a year before the trial, and consequently was about December, 1853. In January and May, 1854, the other bills of goods, consisting mostly of fine and valuable articles, were sold to her. In September and December, 1853, and in May, 1854, she made payments amounting to some \$37.

To whom, then, was the credit given ? The plaintiff knew Mrs. Silliman at Quackenbush's, and at his own store, for four or five years, as a paying customer. Finally, she desires to trade on credit. He knows nothing about her husband, or his circumstances ; nor does he seem desirous to know. He asks for *her* name, obtains it, and makes the charges to her. Would it not have been just as easy, and much more proper, to have asked her for her husband's name, if it was intended to give him the credit. The husband is never spoken to upon the subject, nor is his name ever mentioned to his wife. But *she* is several times called upon in reference to the bills ; *she* makes payments, and is sold other goods.

The credit would clearly seem to have been given, not to the defendant, but to his wife ; and having been once given to her, the plaintiff cannot now change it, so as to make the defendant liable. The court below passed upon the question of credit as one of fact. This court cannot disturb that finding ; nor does the case induce a belief that the justice ought to have found otherwise.

The judgment is affirmed, with costs.

SUPREME COURT.

LORENZO WINSLOW agt. JOHN K. BUEL.

Where, in an action upon a decree for the payment of money, it was set up in defence, that a conveyance of land was made to, and received by, the creditor in satisfaction of the decree; and the plaintiff replied that it was, upon the representation of the defendant, believed by the creditor, that the grantor had a perfect title to the land; whereas he had not any title or interest therein; *held*, that the reply was bad on demurrer. It did not show a total want or failure of consideration.

Monroe Special Term, October, 1854.

DEMURRER to part of a reply.

The action is upon a decree; and the pleadings are sufficiently stated in the opinion.

M. S. NEWTON, *for defendant.*W. F. COGSWELL, *for plaintiff.*

T. R. STRONG, Justice. The reply which is demurred to does not avoid the bar to which it relates. It is, in substance, that Carver agreed with the defendant to accept, and did accept, the lot of land, and the conveyance thereof by Spear, in satisfaction of the decree, and did execute and acknowledge an instrument for the satisfaction of the decree, upon the statement of the defendant, and Carver fully believing that Spear had a perfect title to the land; whereas he had not any right, title or interest therein. No fraud is alleged; the plaintiff relies solely upon a want or failure of consideration for the agreement, and what Carver did under it, to avoid their effect. Assuming that this would be sufficient, it must at least be total. If Carver derived any benefit under the agreement, the agreement must stand. The reply does not show a total failure of consideration. Carver still retains the conveyance, and so far as appears, is in the undisturbed possession of the lot. It is not averred that he has been evicted. And if he shall be

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evicted, he has Spear's covenant of warranty to resort to for his indemnity.

It would be most unjust to the defendant to allow Carver to hold on to those benefits, and his assignee to recover on the decree. The defendant would have to pay the decree, and yet be deprived of the land, and all claim upon Spear for the moneys paid him for it. This the law will not tolerate.

In an action by a vendor of land, with a covenant of seizin or warranty, to recover the purchase money, it is not a sufficient answer to the action that the plaintiff had not any title. An eviction must be alleged; or it must in some way appear that defendant did not obtain any estate or interest under the conveyance. A total want or failure of consideration must be shown. (*Whitney agt. Lewis*, 21 Wend. 131; *Tallmadge agt. Wallis*, 25 Wend. 107.) The principles of these cases are decisive against the plaintiff. If a partial defect of consideration will not defeat an action for the purchase money, it cannot avoid the defence set up in this case.

The defendant must have judgment on the demurrer.

SUPERIOR COURT.

WILLIAMS agt. RIEL and GRANGER.

An affidavit, verifying a complaint, which merely states that the complaint is true, without stating that it is true to the knowledge of the party making the affidavit, is substantially defective. A defendant, in such a case, may serve an unverified answer. If the plaintiff refuses to receive the answer, and enters up judgment, the latter will be set aside for irregularity.

At Chambers, September 27, 1855.

THE defendant, *Riel*, moves to set aside a judgment, which has been entered against him, for irregularity. An unverified answer was served on plaintiff's attorney, within twenty days after service of the summons. He returned it, with a notice in

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writing that he refused to receive it, because it was not verified. After twenty days from the service of the summons, the plaintiff entered up judgment, as for want of an answer.

The defendant insists, that the verification of the complaint was so defective, that he had a right to treat the complaint as an unverified pleading, and to serve an unverified answer. That is the only question that arises on this motion.

The complaint is on a note made by *Granger*, payable to order of *Riel*, and by him endorsed to the plaintiff. The allegation, as to the making of the note, its contents, its delivery to the payee, the endorsement and delivery of it by him to the plaintiff, its presentment at maturity for payment, its non-payment, and notice to the endorser, are direct and absolute. Nothing is alleged on information and belief. The verification is in these words:—

“City and County of New-York, ss:—*Joseph H. Williams*, the plaintiff, being duly sworn, says—That he has read the foregoing complaint, and knows the contents thereof, and that the same is true.

“Sworn to before me, &c.”

J. R. FLANAGAN, *for defendant Riel*.

GEO. STEVENSON, *for plaintiff*.

BOSWORTH, Justice. The Code requires that the affidavit, verifying a pleading, shall “be to the effect, that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true.”

The affidavit in this case does not state that the person making it has any knowledge, whether the complaint is true or not.

The Code is not satisfied with an affidavit which states that a pleading is true, and states only that. It must also state that the person making it *knows* every averment in it to be true, except such as the pleading itself professes to state on information and belief.

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The verification being substantially defective, the next question is, what course may a party, served with such a pleading, pursue in reference to it?

The complaint is perfect as a pleading without being verified. The verification is important, merely with reference to subsequent proceedings. If the complaint is verified, the answer must be, or it may be refused. If no answer is put in, a plaintiff in some cases may take judgment for the amount mentioned in the summons; whereas, if not verified, an assessment and proof of damages would be necessary before judgment could be entered.

It is obvious, therefore, that a defendant must answer a complaint, whether it is verified or not. If not verified, the answer need not be. If a plaintiff wishes to verify his complaint, there is no difficulty in doing it with substantial accuracy. If he chooses to leave it substantially defective, a defendant should be permitted to disregard the verification, and treat it as an unverified pleading.

The following decisions support this view:—*Lane* agt. *Morse*, 5 *How. Pr.* 394; *Waggoner* agt. *Brown*, 8th *id.* 212; *Fitz* agt. *Bigelow*, 5th *id.* 237; *Hubbard* agt. *Cutler*, 11th *id.* 149–152.

If this view be correct, the judgment was irregularly entered. An order will be entered setting it aside, with \$5 costs, and declaring the service of the answer to be regular, on defendant's stipulating not to bring any action by reason of the levying of the execution issued on the judgment.

SUPREME COURT.

CHARLES GOODYEAR, President, &c., agt. ISAAC W. BAIRD
and others.

Where notice of taxation of a bill of costs served upon an attorney residing at a distance, is so short, (four days,) that the attorney serving the notice has reason to believe that the former will be unable to attend upon the taxation, he should not be held to be concluded by his failure to appear, although the notice be technically regular. The taxation should be reviewed in the same manner as if the attorney had in fact appeared and made all proper objections. It was not the intention of the legislature, in providing in the Code for an *extra allowance*, that the courts should add *ten per cent.*, indiscriminately, to every judgment taken by inquest. It is not enough that an answer has been put in, which obliges the plaintiff to prove his case. That provision looks to the *mode of conducting* the defence, rather than the defence itself. There is nothing *necessarily unreasonable or unfair* in the mere denial of the plaintiff's allegations.

Where the action is upon a promissory note, and an answer is put in by an endorser, who does not appear at the circuit, he waives a trial by jury; there is therefore no necessity for a jury; and the jurors' fees (\$3) (when they assess the damages) ought not to be allowed in the plaintiff's costs.

Albany Special Term, March, 1855.

MOTION for retaxation of costs, &c.

The action was brought upon a promissory note for \$300, made by the defendant Baird. The other defendants were accommodation endorsers. The complaint not being verified, the defendant Frazier put in an answer, in which he denied each and every allegation in the complaint. The summons and complaint were served on Frazier on the 3d of March, 1854, and the answer was put in within twenty days. The other defendants made no defence. The issue was noticed for trial at the Schoharie circuit; and, on the 16th of May, an inquest was taken against Frazier, no affidavit of merits having been filed or served.

Application was made for an extra allowance of costs; and it is stated in the affidavit of the plaintiff's attorney, that the judge presiding at the circuit directed that ten per cent. upon

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the amount of the recovery should be allowed. The amount of the recovery was \$307.34. The entry in the minutes of the clerk upon the application for an extra allowance is as follows: "Court directs the plaintiff to take the extra allowance for costs allowed by statute." On the same day, the plaintiff's attorney mailed at Schoharie a notice to the defendant's attorney, who resides in the county of Sullivan, that the costs would be adjusted on the 20th of May, by the clerk of Schoharie. The notice was too short to enable the defendant's attorney to appear upon the taxation. The costs were taxed at \$74.21, which included \$30.73 for extra allowance, and \$34 allowed by the statute: also \$3 for jury fees.

The defendant, Frazier, moved for a re-taxation.

R. C. MARTIN, *for plaintiff.*

THOMAS SMITH, *for defendants.*

HARRIS, Justice. The notice of taxation was *technically* regular. Yet, where, as in this case, the notice served upon an attorney residing at a distance is so short, that the attorney serving the notice has reason to believe that he will be unable to attend upon the taxation, he should not be held to be concluded by his failure to appear. The taxation should be reviewed in the same manner as if the attorney had, in fact, appeared and made all proper objections.

The principal objection made by the defendant to the costs as taxed, relates to the item for extra allowance. The entry of the clerk leaves it uncertain what amount was allowed. It might be inferred, perhaps, from the language of the entry itself, that the court had directed that the allowance should be to the full extent authorized by statute. That such was, in fact, the direction, is made clear by the affidavit of the plaintiff's attorney, who swears that the judge, at the circuit, directed an extra allowance of ten per cent. upon the amount of the recovery, and added, that such was his practice in all cases where the defendant allowed judgment to go against him by default.

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Were I at liberty to decide upon the propriety of the allowance, I could not hesitate to pronounce against it. I cannot suppose that the legislature ever intended that the courts should add ten per cent. indiscriminately to every judgment taken by inquest. It is not enough that an answer has been put in, which obliges the plaintiff to prove his case. The provision of the statute looks to the *mode of conducting* the defence, rather than the *defence itself*. There is nothing *necessarily unreasonable* or *unfair* in the mere denial of the plaintiff's allegations. The allowance which the court is authorized to make, is by way of compensation for the trouble and expense to which the plaintiff may have been subjected by reason of the *unreasonable* or *unfair* manner in which the defence may have been *conducted*. The idea of punishing the defendant for having denied what the plaintiff has been able to prove to be the truth, is not found in the provisions of the statute.

In an action like this, \$22 are added to the taxable costs, as the consequence of interposing the answer denying the allegations of the complaint. Ordinarily, this sum is quite an adequate compensation for the trouble and expense of taking an inquest. It evidently was so in this case. To add to this an extra allowance of \$30, and that, too, against a mere surety, would seem to be a perversion of the intent of the legislature in providing that an extra allowance may, in the discretion of the court, be awarded to a plaintiff, where a defence has been *conducted unreasonably* or *unfairly*. But in this case such an allowance was made, and though the entry by the clerk was informal, I am inclined to think it was sufficient to indicate the intention of the court. This being so, I have no power to reverse the order upon this motion. This, if indeed it could be done at all, could only have been done upon appeal from the order making the allowance.

The plaintiff has, perhaps, through inadvertence, taxed \$5 too much for the fees allowed by statute. The taxable items amount to \$29, instead of \$34. I observe, too, among the items of disbursement, a charge of \$3 for jury fees upon the inquest. The defendant, by failing to appear, waived a

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trial by jury. In actions sounding in damages, the judge who presides sometimes prefers that they should be assessed by a jury, even when the defendant does not appear. But in a case like this there certainly was no necessity for a jury. The practice ought not to be encouraged. I shall, therefore, direct that this item be disallowed to the plaintiff. I do it the more willingly, because the costs, including the extra allowance, are, under the circumstances, oppressively large.

An order must be entered directing that eight dollars be deducted from the costs as taxed: neither party to have costs upon this motion.

SUPERIOR COURT.

J. H. HOWARD and CHAS. BROWN agt. TAYLOR.

When, *pendente lite*, in an action on contract, the plaintiffs sell and assign the subject matter of the action to a third person, he will not be substituted as plaintiff, on motion of the plaintiffs to the record, and without notice to him. The alleged purchaser is the person to move for substitution; and he should do so, on notice to the plaintiffs, as well as to the defendant. Even in such a case, it is not a matter of course, to order a substitution, without imposing any conditions.

At Chambers, Oct. 6, 1855.

ON an affidavit of *C. Brown*, that this action is on contract, to recover \$314, is at issue, that plaintiffs have assigned their interest in the subject matter of the action to *John C. Brown*, and that the affiant, *C. Brown*, is desirous the latter should be substituted as plaintiff in this action; the *plaintiffs*, on a notice from their attorney to the defendant, and to him only, move for an order making such substitution. This is opposed, on the ground that the pretended purchaser is the proper party to make the motion.

M. K. BURKE, *for plaintiffs.*

H. W. JOHNSON, *for defendant.*

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BOSWORTH, Justice. This motion is made under § 121 of the Code. No notice of it has been given to *John C. Brown*, and the motion is not made by him, nor on his behalf. He has not had a chance to be heard. He may deny that he has bought the right of action. If the motion was granted, a third person might be made plaintiff in the action, not only without his knowledge, but against his will. If he claims to have purchased the subject matter of the action, he should move to be substituted, if he wishes to be made plaintiff upon the record, and should move on notice to the plaintiffs as well as to the defendants.

But if he should move for such a substitution, and it should be apparent that the main motive for the change was the present plaintiff's witnesses, the court might impose, as a condition, that he stipulate not to call them as witnesses. (6 *Howard, Pr. R.* 220.)

In the case of such a change of interests, *pendente lite*, it is discretionary with the court to allow, or refuse to allow, a substitution of the purchaser as plaintiff. Where a substitution cannot prejudice any right or remedy of the defendant, it would be almost a matter of course to permit it. When such a result would be produced by the change, the court would either refuse to permit it, or would grant it only on such terms as would protect the defendant from injury.

Deming agt. Chapman.

SUPREME COURT.

EGBERT DEMING agt. EZRA S. CHAPMAN.

In an action brought to compel the defendant to keep secret a certain invention, in pursuance of a written agreement between the parties, an *injunction*, restraining the defendant from divulging or teaching the secret, art, and invention of such matter, is not the proper remedy, especially where the defendant denies that he has divulged the thing mentioned in the agreement, but something else.

Because the moment the investigation as to the identity takes place, the secret vanishes—its *exclusiveness* is gone, and with it the action itself. And besides, the patent laws provide that inventions shall be secured for a certain time, and in a certain manner; and this jurisdiction is confided to the General Government, not to the state courts.

An action *for damages* is probably the only redress the plaintiff has in such case.

New-York Special Term, Oct, 1854.

— — — — — *for defendant.*
— — — — — *for plaintiff.*

ROOSEVELT, Justice. The object of this suit—a somewhat novel object, it would seem—is to compel the defendant to keep a secret. On the 1st of July last, one of my colleagues, deeming the case made by the plaintiff to be *prima facie* sufficient, issued a temporary injunction to restrain the defendant “from divulging or teaching the secret, art, and invention of marbleizing iron, slate, and other articles,” according to the method which the plaintiff had taught him, and which, under the solemnity of an oath, he had stipulated by writing, in the form of an affidavit, sworn 4th March, 1852, “not at any time thereafter to make known, discover, or in any manner impart or communicate to any person, except Egbert Deming,” the plaintiff. An order was at the same time made, requiring the defendant to show cause why the injunction, so granted, should not be continued till the final hearing.

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The defendant now insists that "the art of making artificial marble" was the invention of a person of the name of Hardinge, in the state of Ohio; that Hardinge, in 1850, communicated the secret to one Williams, under a sworn stipulation, or affidavit, not to reveal it without Hardinge's consent; that Williams, on the 25th of February, 1852, violating his oath and agreement, communicated and sold the secret to Deming; and that Deming, therefore, deriving his own title, whatever it may be, through a violation of Williams's obligation to Hardinge, has no right either in law or equity, to demand the enforcement of Chapman's precisely similar obligation to him.

To meet the force of this answer—so direct and seemingly conclusive—the plaintiff alleges that the invention, as he purchased it of Williams, was "in an inefficient state, and nearly worthless." But how is such a position to be reconciled with the admitted dates of the case. Williams swears that he imparted the secret to Deming on the 25th of February, 1852; and Deming, in his complaint, swears that his contract with Chapman was on the 4th of March, only one week after. How, in so short an interval, could "much time and money have been spent in bringing out and perfecting the art." And yet Deming swears *he* made the alleged improvements. While on the other hand his witness, Williams, swears that the invention, as imparted by him to Deming, was entirely different from "the processes used by Hardinge," or, in other words, that he, *Williams*, imparted to Deming the improved invention, and of course that he, Williams, was the improver. But this is not all: Chapman produces a written instrument, (sworn, like the two already referred to,) taken by Deming from three other employees, only one week before Chapman's, in which he speaks, or makes them speak of the invention as "the secret, art, mystery, invention, and discovery, imparted and made known" by Williams.

With this contradiction before me, and without the least intimation of the particulars of the alleged improvement, I am bound, I think, to presume that the secret communicated to the defendant, Chapman, was substantially the same "art (as ex-

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pressed in the contract with Hardinge) of making artificial marble," (not with merely painting with marble colors,) which Williams, if the doctrine of the plaintiff's complaint is good law, had no right to sell or reveal to Deming, and which Deming, therefore, had no right to sell or reveal to Chapman, or in any way to make the subject of a bill in equity. Hardinge, if any one, is the aggrieved party, and Deming, as much as Chapman, is the aggressor. Instead of Deming, therefore, filing a complaint against Chapman, Hardinge should file a complaint against both.

Is such a complaint, moreover, in any case sustainable? The patent laws provide that inventions shall be secured for a certain time, and in a certain manner. How, then, can the courts, in effect, secure an invention without a patent, and for a period of indefinite duration, instead of the limited time of fourteen years. Besides, the jurisdiction "of securing, for limited times, to inventors, the exclusive right to their respective discoveries," is confided by the constitution to the general government. Can the state tribunals, then, assume the same function after the general government has acted on the subject? But how is a decree, if made, to be enforced? The plaintiff must allege that the defendant has revealed the prohibited secret—the defendant admitting that he has revealed something, denies that it is the thing mentioned in his agreement—a question of identity arises for the court to determine; and how is the identity of two given things to be investigated, if we are not permitted to inquire what the given things are? But the moment the investigation takes place, the secret vanishes—its exclusiveness is gone; and with the exclusiveness of the subject of the action, the action itself disappears. (*See the cases of Neuberry agt. James*, 2 *Merivale*, 446, and *Williams agt. Williams*, 3 *id.* 160.) An injunction, therefore, (if any,) is not the appropriate remedy—it is obviously inefficient in practice and incapable of enforcement. An action for damages would seem to be the only redress in such cases.

Motion to continue the preliminary injunction denied, without costs.

Jacquin agt. Buisson.

SUPERIOR COURT.

HENRI JACQUIN, Collector, &c., agt. JOSEPH P. BUISSON.

In an action, by an heir at law of a deceased partner, for a dissolution of the co-partnership, an account, an injunction, and a receiver, where the articles of co-partnership, or association, were executed at Brussels, on the 8th April, 1853, in the French language, establishing a limited commercial partnership, for ten years, designated a collective partnership—(*en nom collectif*)—the location to be in the city of New-York, a defence was interposed, by the surviving partner, that, under the articles of association, the partnership must remain in force for the unexpired period fixed for its duration.

Held, that the rights and position of the parties were to be examined, and should be considered as affected, both by our own law and by the law of France, which applied to the contract, if any foreign law did so apply.

The *tenth article* of the association was as follows: "The decease of M. Jacquin shall operate no dissolution of the co-partnership, and shall open no necessity for laying on the public seals, at the business place, nor of an inventory. His heirs and representatives will be considered as having succeeded him from the last inventory that may have preceded his demise; and they shall have three months, to date from such decease, for declaring whether they intend continuing the partnership upon the same basis, or transforming it into a partnership *en commandite*."

"If they declare their intentions to be to transform the partnership, or, within the time allowed them, they neglect making known their intentions, the partnership shall of full right be transformed into such a partnership *en commandite* in regard to them. Mr. Buisson shall thenceforth be the sole responsible manager, and it shall then continue upon the new basis, without any other modification, up to the time fixed for its expiration."

It appeared that the partner Jacquin died in January, 1855, intestate, leaving a widow and three children, of whom the plaintiff was one. There had never been any announcement, directly made by the heirs and representatives, of their election to proceed with the partnership *en nom collectif*, or as general partners. But the facts authorized the supposition of the concern proceeding upon the other basis, viz., *en commandite*. Applying the law to such a case,

Held, 1st. That no representative of an estate, or parties interested in it, can be bound to become partners with a survivor, so as to make themselves personally responsible, or subject them to the duties of partners, without their consent. No articles of covenant or direction in a will can impose this personal obligation upon them.

2d. But the party may, by articles or his will, direct the whole of his estate to remain in the firm, and be liable to the debts incurred in the business carried

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on subsequent to his death. He must demonstrate such an intention in the most positive and unequivocal manner.

3d. A direction that the capital already in, or a given amount of it, should remain in the firm during a stated period, gives the acting partner the possession of the fund, and the right to use it. He can only be interfered with on grounds which will justify every partner to break up a partnership, before the expiration of its limited continuance.

When, therefore, a stipulation is in favor of a particular party, or of a representative, he may refuse to act upon it, and the firm is *dissolved*. If there is a covenant, or a testamentary direction for the continuance or investment of capital, it will *bind the estate*. If the party avail himself of the stipulation, he will become *personally* bound; but otherwise the estate or fund will alone remain liable.

The partnership, *en commandite*, of the modern civil law, has, as its leading and distinguishing elements, the exemption of the contributors to any personal responsibility for the debts; the subjection solely of the fund contributed by each to such liability; the general unlimited responsibility of the actor, (*Le Gerant*), and the omission of any necessity to disclose the names of the contributors, (although the amount is published,) except in case of a failure; and then only to reach the amount of their investment.

The provision in the articles of partnership in this case, is perfectly lawful by the law of the country where the contract was made; and under it the widow and heirs continued partners, *en commandite*.

But it is not to be questioned that a limited partnership, formed under our statute, is dissolved by the death of one of the partners, as it is in ordinary cases; that is, so far as the statute regulates it.

A striking distinction between the principle of our statute and that of the French law is, that by the former the names of the special partners must appear upon the public record.

Our statute has prescribed a system which will extend to provisions of this nature. The parties designated in articles or a will, to continue a partnership, or to be interested in it, after a death, should be obliged to renew the formalities of the statute, if they would remain special partners, with the fund alone responsible; and if they continue the business without this form, then they become general partners, liable in like manner as all other dormant partners.

The result in this case is, that there was a general partnership, which the representatives have not chosen to continue as such, and now seek to continue as a limited partnership, without pursuing the regulations of the statute. It follows that a dissolution has taken place by the death of Jacquin.

The survivor has then a right to wind up the business, and can only be interfered with on the ground of unfaithfulness or insolvency.

At Chambers, New-York, September, 1855.

APPLICATION for an injunction and receiver.

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MR. SOUTHMAYD, *for plaintiff.*

MR. DYKERS, *for defendant.*

HOFFMAN, Justice. The plaintiff sues as collector (administrator *ad colligendum*) of Joseph Julien Jacquin, who, in his lifetime, was a partner with the defendant, Buisson. He sets forth the formation of the partnership; the death of Jacquin, who was his father; the consequent dissolution; and seeks an account, an injunction, and receiver. Some other matters are stated in the complaint, which will be hereafter noticed.

The defendant resists the application, and the whole relief sought in the action, upon the ground that, under the articles of association, the partnership must remain in force for a number of years—the unexpired period fixed for its duration.

The articles were executed at Brussels, on the 8th of April, 1853, in the French language; and the first article established a commercial partnership between the parties, the location of which was to be in New-York, and the object, the making and selling of liquors and sugar-plums. It was expressly designated a collective partnership—(*en nom collectif*;) and its duration is fixed for ten years from its institution.

The tenth article is as follows:—

“The decease of M. Jacquin shall operate no dissolution of the co-partnership, and shall open no necessity for laying on the public seals, at the business place, nor of an inventory. His heirs and representatives will be considered as having succeeded him from the last inventory that may have preceded his demise; and they shall have three months, to date from such decease, for declaring whether they intend continuing the partnership upon the same basis, or transforming it into a partnership *en commandite*.

“If they declare their intentions to be to transform the partnership, or, within the time allowed them, they neglect making known their intentions, the partnership shall, of full right, be transformed into such a partnership, *en commandite*, in regard to them. Mr. Buisson shall thenceforth be the sole responsible

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manager, and it shall then continue upon the new basis, without any other modification, up to the time fixed for its expiration."

The partner, Jacquin, died in January, 1855, intestate, leaving a widow and three children, of whom the plaintiff is one. These are stated to be his heirs and next of kin.

There has never been any announcement, directly made by the heirs and representatives, of their election to proceed with the partnership *en nom collectif*, or as general partners. I consider the acts stated in the affidavit of the defendant wholly insufficient to bind them to this extent. They are consistent with the wish, or the supposition of the concern proceeding upon the other basis, viz., *en commandite*.

The rights and position of the parties are then to be examined upon this footing; and should be considered as affected both by our own law and by the law of France, which, it is assumed, applies to the contract, if any foreign law does so apply.

I. I have examined the leading authorities upon this subject, particularly *Wrexham* agt. *Huddleston*, (1 *Swanston*, 514 n.,) *Ex parte Garland*, (10 *Vesey*, 110,) *Ex parte Richardson*, (3 *Mad. Rep.* 138;) *Barwell* agt. *Mandeville*, (2 *Howard's S. C. Rep.* 560;) and *Davis* agt. *Collins*, (6 *Hare*, 418.) The following rules may, I think, be deduced from them.

1st. That no representatives of an estate, or parties interested in it, can be bound to become partners with a survivor, so as to make themselves personally responsible, or subject them to the duties of partners, without their consent. No articles of covenant, or direction in a will, can impose this personal obligation upon them. (See also *Madgwick* agt. *Wimple*, 6 *Beavan*, 495, and *The Louisiana Bank* agt. *Kenner*, 1 *Miller's Louisiana*, 884—a leading case.)

The case of *Kershaw* agt. *Mathews*, (2 *Russell*, 62,) shows, that where there is merely a stipulation giving a right of succession, if the party named, or the executors, refuse to come in, the partnership is dissolved.

2d. But the partner may, by articles, or his will, direct the

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whole of his estate to remain in the firm, and to be liable to the debts incurred in the business carried on subsequent to his death. He must demonstrate such an intention in the most positive and unequivocal manner. Even in such a case, *Davis* agt. *Collins* appears to prove, that upon the executor refusing to go on, or to contribute capital as directed, an action for damages for the breach of the obligation imposed upon him, would be the proper remedy; not any interference of a court of equity.

3d. Again, a direction that the capital already in, or a given amount of it, should remain in the firm during a stated period, presents the more common, and the simplest case. The acting partner has then possession of the fund, and the right to use it. He can only be interfered with on grounds which will justify every partner to break up a partnership, before the expiration of the time limited for its continuance.

4th. Now in such a case, Justice STORY, in delivering the opinion of the court in *Barwell* agt. *Mandeville*, expressly states, "that third persons, having notice of the death, are bound to inquire how far the agreement or authority to continue it extends, and what funds it binds; that the creditors can resort to that fund or amount alone, and not to the general assets of the testator's estate, although the partner, or executor, or other person carrying on the trade, may be personally responsible for all the debts contracted."

Thus, then, when the stipulation is in favor of a particular party, or of a representative, he may refuse to act upon it, and the firm is dissolved. If there is a covenant, or a testamentary direction for the continuance or investment of capital, it will bind the estate. If the party avail himself of the stipulation, he will become personally bound; but otherwise the estate or fund will alone remain liable.

It follows that, by the *general* and English law, in a case of this simple character, where a capital is ordered to remain in a firm after a dissolution by death, the great object of a limited partnership is attained. Subsequent creditors can resort only

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to the fund. If no representative agrees to engage in the business, there can be no personal liability.

II. I proceed to consider the French law, as applicable to this contract. I have before observed, that there is not sufficient proof to show an election by the representatives, to become general partners. The relation of the parties is then that prescribed in the alternative clause of the tenth article.

The partnership *en commandite* of the modern civil law has, as its leading and distinguishing elements, the exemption of the contributors to any personal responsibility for the debts; the subjection solely of the fund contributed by each to such liability; the general unlimited responsibility of the actor, (*Le Gerant*,) and the omission of any necessity to disclose the names of the contributors, (although the amount is published,) except in case of failure, and then only to reach the amount of their investment. Until this event, no action will lie against them for the engagements of the actor. The management is left solely to him, and any voluntary interference renders the party a general partner. (*Art. 23, Code de Commerce; Pardessus Droit Commercial, vol. 4; Troplong Du Contrat De Societe, Ar. 377, 402, 408.*)

Such an association, unknown to the English law, appears to have been a favorite commercial combination among the nations of southern Europe during the middle ages. "It sustained," says a French writer, "the navigation of the Mediterranean. It led to the voyages of the mariners of Languedoc, of Provence, and of active Italy. It carried merchants to the east in "the train of the crusaders; and it enabled the Lombards to rear the superb palaces of Florence and Pisa; it came to the aid of capitalists, whether among the nobles or the commons, who were restrained by the canon law from loaning their money upon interest, or who were averse to engaging openly in commerce. Capital, struck with sterility by the prohibitions of the church, found in this association an outlet lawful and profitable." (*Troplong, 383.*)

This author has reviewed the changes which were effected in France upon the Italian theory of such a partnership, by the

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ordinance of Louis XIV, and mercantile usage. The code of commerce so far recognized these modifications as to require a partnership title (*un nom société*) to be taken, and a registration of the sums contributed to be made, although the names need not be disclosed. (*Troplong, Art. 402, 406, 408; see also article 284 as to the contents of the registration.*)

The rule of the Roman law was, that an engagement binding heirs to continue a partnership was absolutely void. (*Inst. Justin: De Socio, § 5.*) But this rule was altered, even among those nations with whom the Roman law was the basis of jurisprudence, and is entirely different in France. Such an agreement may legally be made to bind the succession. *Tam hæredibus nostris quam nobisme-tipsis cavemus.* (*Troplong De Societe, Art. 951, 955, 956.*) So fully is this doctrine recognized, that the rule seems to be that it prevails even as to minors; certainly it does so when the partnership is *en commandite*. (*Id. 954.*)

The objection, that the assent of the parties which is necessary to form a partnership ought to be the rule for its continuance, is answered thus—that the former is an act of the will, the latter a charge upon the heritage. The death of the actor, (*Le Gerant,*) indeed, produces a dissolution; for, in regard to him, the association is formed with respect to the person, and not to the business.

It is, therefore, plain, that the provision in the articles of partnership now in question, is perfectly lawful by the law of the country where the contract was made, and that under it, the widow and heirs continued partners *en commandite*.

One circumstance deserves notice before leaving this part of the case. The French law is extremely rigid as to the effect of an interference (*immixtion*) by a contributor, with the affairs of the company. (*Code Com. 27; Troplong, Art. 420, &c.*) A question might arise whether the purchase and shipment of goods from France mentioned in the affidavit, was not such an intromission. But the facts are too imperfectly stated to decide this point. The terms and mode of transmission are not

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disclosed, and the widow, Madame Jacquin, is alone named as making the shipment.

III. I come, then, to a point strongly pressed by the counsel for the plaintiff, and of no little interest.

It is urged that our statute, authorizing and regulating limited partnerships, has created a system which is not merely permissive, but exclusive. That what it does not explicitly sanction, it forbids. And especially that, if the rule of succession in a limited partnership will involve a principle substantially hostile to a principle of the statute, it cannot be allowed.

The statute (1 R. S. 764) in its first section declares, that limited partnerships for the transaction of any mercantile, mechanical, or manufacturing business within this state, may be formed, upon the terms, with the rights and powers, and subject to the conditions and liabilities herein prescribed." By § 4, all the parties are to sign a certificate, which contains, among other things, the names of all the partners, general as well as special, with the amount of capital contributed by the latter.

By § 7, at the time of filing the certificate, an affidavit of one or more of the general partners must be filed, stating the sums specified to have been actually and in good faith paid in cash. No partnership shall be deemed to be formed until the certificate shall have been filed and recorded.

By § 9, the terms of the partnership are to be published for at least six weeks after the registry.

Section 11, provides for a renewal or continuance of such partnership. The certificate and notice are to be made and given as upon the original formation; and every such partnership which shall be otherwise renewed or continued shall be deemed a general partnership.

The 12th section directs, that upon any alteration in the names of the partners, similar formalities are to be gone through as upon the constitution of the partnership.

By the 24th section, no dissolution by the acts of the parties previous to the time specified shall take place, until a notice of such dissolution shall be filed in the clerk's office.

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I apprehend that it is not to be questioned, that a limited partnership, formed under the statute, is dissolved by the death of one of the partners, as it is in ordinary cases. That is, so far as the statute regulates the matter, such would be the result.

A striking distinction between the principle of the statute and that of the French law is, that by the former the names of the special partners must appear upon the public record. If the provision in the present case can be carried into effect, the widow and heirs of *Jacquin* retain the privilege of exemption from personal responsibility, while their names are unknown. They reap a share of all future profits, and bear their share of future losses in proportion to the fund they have invested, and yet remain sheltered from individual liability. All this is repugnant to the pervading principles of the statute, of a registry, and a publication, containing the names of all the associates, as well as the sums contributed.

And yet the English law (the strong enemy of limited partnerships) permits an exception to its rigor, when it allows the funds of the deceased to be retained and acted upon, and subjects those funds alone to responsibility for future debts.

The question is one of great interest in a commercial community, and calls for a more ample and deliberate examination than can be given upon an application of this nature. My impressions are, that the statute has prescribed a system which will extend to provisions of this nature. That the parties, designated in articles, or a will, to continue a partnership, or to be interested in it after a death, should be obliged to renew the formalities of the statute, if they would remain special partners, with the fund alone responsible; and if they continue the business without this form, then they become general partners, liable in like manner as all other dormant partners.

It may be noticed, that in the instructive discussion of the subject of partnerships by the French writer I have referred to, he traces the progress of the law as to such an association, from the time when (as an eminent civilian, *Cassaregis*, termed it,) it was not a partnership, but an association in participation, to

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the time when it received, in the ordinance of Louis XIV, a fixed character as a proper partnership, down to the time of the Code, when the partnership name, and the registration of the capital of each member, was made essential. At each step greater restrictions and greater publicity has been achieved; and our statute has taken another step in advance, by requiring the names of all the contributors to be publicly disclosed.

The result then is, that there was a general partnership, which the representatives have not chosen to continue as such, and now seek to continue as a limited partnership, without pursuing the regulations of the statute. It follows that a dissolution has taken place by the death of Jacquin.

The survivor has, then, a right to wind up the business, and can only be interfered with on the ground of faithlessness or insolvency. (*Evans agt. Evans*, 9 *Paige*, 178.)

Another point has been relied upon by the counsel for the plaintiff. By article 9 of the agreement, each co-partner shall have the right of causing the immediate dissolution of the company to be pronounced, if two successive inventories exhibit loss, or when, at any one time, any inventory shows the loss of ten thousand francs; but he shall have to declare such demand under pain of losing his right thereto, within one month from the definitive conclusion of the inventory that may have supplied the cause of such dissolution.

The inventory produced by the plaintiff, and sworn to by the clerk, makes the loss \$3,691.21, over ten thousand francs. The defendant produces an inventory making the loss \$1,067.64. The principal difference consists in the sum of \$2,510.59, which the defendant treats as cash belonging to the firm. This is no doubt the sum referred to in the affidavit of Buisson, as drawn from the bank by the plaintiff; and I should require some further explanation of this item, if the question of loss to ten thousand francs was essential to the decision of the case. Besides there is great force in the suggestion, that the answer of the widow, and the other heirs in France, was necessary before a dissolution could be pronounced on this ground.

My conclusion is, that the case stands as one of a general

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partnership, dissolved by the death of one of the firm. The defendant must, therefore, take one of the propositions offered by the plaintiff, or a receiver must be appointed. It appears to me a very proper case for carrying on the business for the three following months, if that can be done without danger to the rights of either party. (*Madgwick agt. Wimble, 6 Beavan, 500.*)

Order accordingly.

Since the decision of this motion, I have noticed the case of *Ames agt. Deming*, (1 *Bradford Rep.* 321.) The surrogate of New-York, in a very able and learned opinion, has arrived at the conclusion herein stated, that the death of a special partner dissolves the firm, and has gone over much of the interesting ground of the French law which I have explored. I find also, that in Pennsylvania there is an express provision in the statute on the subject, for the continuance of the capital of the special partner through his representatives, for the unexpired term, or a sale of the interest, in their discretion. (*Purdon's Digest Laws Penn.* 544, § 28.

SUPREME COURT.

THOMAS WALKER President of the Bank of Utica, agt. HENRY
B. HEWITT.

One design of the legislature in enacting the Code, was to introduce *truthfulness* into *pleadings*. (See *Dunning agt. Thomas, ante page 251.*)

An *answer* which merely puts in issue the allegations of the complaint, either by a direct denial, or by a denial of all knowledge of any information sufficient to form a belief in relation to them, *may be stricken out as false*. The *general issue* is abolished; and the object of the Code is, to require each party to state the *facts* upon which he relies, and to bring the litigants to an issue upon the facts really controverted. (*As sustaining this view, see Nichols agt. Jones, 6 How. Pr. R. 355; Conklin agt. Vandervoort, 8 id. 453; Mier agt. Cartledge, 8 Barb. 75; Richardson agt. Wilber, 4 Sand.*

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708; *Henry* agt. *Rogers*, 9 *How. Pr. R.* 215; *Flammer* agt. *Kline*, *id.* 216; and *Henry* agt. *Brown*, *id.* 217.)

An answer, although *verified*, denying knowledge or information of the matters alleged in the complaint, *may be stricken out, upon proof of its falsity*. And when good reason is shown for believing such an answer to have been but in untruth, and in bad faith, the party should be required to support it by a *special affidavit*, showing its propriety under the circumstances of the case (*See cases last cited.*)

If a defendant, in making his denial, has *any knowledge*, he must state it. If he has no knowledge, he may so state, and that he has not *sufficient information to form a belief*. But where he denies that he has not *sufficient* knowledge or information to form a belief, it is insufficient.

Oneida Special Term, March, 1855.

THE complaint was on a promissory note, made by the defendant, to the order of Godard & Hovey, and endorsed by them, A. Miller, and J. V. P. Gardner, and contained an allegation that the note was, "before it became and fell due, delivered to, and discounted by, the Bank of Utica, in its ordinary course of business."

The answer alleged that the note was executed by the defendant for the accommodation of Godard & Hovey, and left with them, upon their agreement that the time of payment (which was left in blank) should be filled up with some day not more than sixty days distant from the date of the note; that instead of that they filled up the blank so as to make it payable at 120 days, and failed in the interval between the 60 and the 120 days; and that Miller obtained the note from them in payment of a prior indebtedness, and with notice of the facts. It contained also the following allegation: "And whether the said note was, before due, discounted by the Bank of Utica in its ordinary course of business, this defendant has not sufficient knowledge or information to form a belief, and therefore prays to be taken as denying the same, and alleging that said bank took the said note with full knowledge of all the facts aforesaid."

On an affidavit of the cashier, that the defendant had, since the maturity of the note, admitted to him that the note was a valid claim in the hands of the bank, and had promised to pay it if the bank would extend the time of payment, the plaintiff moved to strike out this answer as sham and also as irrelevant.

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M. H. THROOP, *for motion.*R. CONKLING, *opposed.*

W. F. ALLEN, Justice. I entered upon the examination of this motion with a desire to ascertain what was the practice established by the decisions of the courts under the provisions of the Code, authorizing the court to strike out pleadings and parts of pleadings, upon motion. But a brief reference to a few of the many reported cases, satisfied me that it would be impossible to extract from them, as a body, any rule which I could apply to this or any case similarly situated; and that the decisions were so entirely conflicting, and therefore unsatisfactory, that the practice might well be said to be *res integra* to each judge who chose to investigate it. As reasons for any conclusion to which I may come, and any proposition which I may lay down, will be found in some of the reported cases, I will not undertake to elaborate the propositions which I think embody a reasonable construction of the parts of the Code under review, and which I will state, so far as they are applicable to this case.

1. The design of the legislature in enacting the Code was, to introduce truthfulness into the pleadings; and to this end they have provided for the verification, by the oath of the party, of pleadings in certain cases, and have authorized sham answers and defences to be stricken out on motion.

2. It has been sought to reduce the matter in issue to as few points as practicable, and to disencumber the pleadings of all extraneous and irrelevant matter, and to make them what they should be, a concise and plain statement of the facts relied upon to support and defend the action; and to accomplish this, it is provided that all allegations in a pleading to which an answer is proper, not controverted, shall be deemed admitted; and that the court may strike out all irrelevant and redundant matter. That the attempt at conciseness and brevity in pleading has signally failed, is conceded; but the failure is to be attributed to the inattention or other fault of the practitioner,

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rather than the Code itself, except so far as the system, in omitting to provide a ready remedy or adequate penalty for rambling and incoherent statements in pleadings, invites and encourages a careless and unlawyer-like method of pleading.

3. Untenable defences, and those interposed for delay, are discouraged by the provision allowing frivolous answers to be stricken out on a short notice, and judgment to be given forthwith in the action.

4. The motion in this case is founded upon the 152d section, which authorizes sham and irrelevant answers to be stricken out. By irrelevant, I understand, an answer entirely foreign, not applicable to the action, as would be an attempt to set-off a debt arising upon contract in an action for assault and battery, or *vice versa*; or the allegation, as a defence of any matter which, though true in fact, has no reference to, or effect upon, the cause of action. If this should be the character of the entire defence interposed to the action, it would be frivolous, and judgment might be given for the plaintiff under the 247th section; but if it was only one of several answers or defences, it might be stricken out under the 152d section; and if it was improperly alleged as a part of another defence, otherwise good, it might be stricken out as irrelevant or redundant under the 160th section. This defence is not irrelevant within the meaning I have given that term.

5. A "sham" defence or answer, as that word is defined by lexicographers, and as it was understood at the time of the adoption of the Code, as applied to pleadings, is one that is false in fact, although perhaps good in form. It may be that a defence is both false in fact and insufficient or frivolous in law, but it is only as a false, counterfeit, or pretended defence, that it may be stricken out under this provision. Ample provision is made elsewhere for dealing with answers and defences which are frivolous or insufficient in law. (*Nichols* agt. *Jones*, 6 *How. Pr. R.* 355; *Miner* agt. *Sickles*, 9 *id.* 217.)

6. The gist of the answer under consideration, as far as it tends to establish a defence to the action upon the note in favor of the present plaintiff, is the attempt at a denial of the title of

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the Utica bank to the note. There would be great difficulty in upholding the answer as a defence to the action, if the objection now taken was disposed of, for two reasons; 1st. It is extremely doubtful, whether the title of Miller to the note is at all impeached by the answer; and, 2d. The title of Gardner, under whom the Bank of Utica apparently takes, is not even questioned. But these questions are not properly before me.

7. I am of the opinion, that an answer which merely puts at issue the allegations of the complaint, either by a direct denial, or by a denial of all knowledge of any information sufficient to form a belief in relation to them, may be stricken out as false. We cannot reason by analogy from the practice under the former system. The general issue is abolished, and the object is to require each party to state the facts upon which he relies, and to bring the litigants to an issue upon the facts really controverted; and although the decisions are conflicting upon this point, and those adverse to my opinion are entitled to high respect, I am constrained to yield my assent to those which hold in accordance with the proposition stated. (*Conklin* agt. *Vandervoort*, 8 *How. Pr.* 483; *Mier* agt. *Cartledge*, 8 *Barb.* 75; *Richardson* agt. *Willen*, 4 *Sandf.* 708; *Nichols* agt. *Jones*, *supra*; *Henry* agt. *Rogers*, 9 *How. Pr.* R. 215; *Flammer* agt. *Kline*, *id.* 216; *Henry* agt. *Brown*, *id.* 217.)

8. Without at this time deciding whether a new and affirmative defence may be stricken out as false when properly verified, I am of opinion that an answer, although verified, denying knowledge or information of the matter alleged in the complaint, may be stricken out upon proof of its falsity. The party verifying his pleadings is entitled to the oath of the party in answer; and to aver a want of the requisite knowledge or information to form a belief falsely, is a wicked evasion of this salutary provision of law; and as it is an evasion easily resorted to for unworthy purposes, it should not be countenanced; and whenever it is made to appear that it is untrue in fact, and that the matters alleged in the complaint are true, and so known or believed by the party answering, the *quasi* denial should be stricken out; and when good reason is shown for believing

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such an answer to have been put in untruly and in bad faith, the party should be required to support it by a special affidavit sustaining it, and showing its propriety under the circumstances of the case. (*See cases last cited.*)

9. In this case the answer should be stricken out. (1.) It is not sufficient as a denial of the plaintiff's title to the note. The defendant simply denies that he has *sufficient* knowledge, &c. He is required to deny *any* knowledge. (*Code*, § 149.) If the defendant has any knowledge, he must state it. If he has no knowledge, he may so state, and that he has not *sufficient information to form a belief*. (2.) The affidavit of the cashier of the Utica bank shows that the defendant had information, which he did believe, and was ready to act upon, in respect to the title of the bank to the note, and this affidavit is uncontroverted. It devolved upon the defendant to explain why it was that he now doubts the title of the plaintiff, after having once been fully informed upon the subject, and admitted it to be good.

The impression is very strong upon my mind, that the defence is a sham defence, interposed for delay.

The motion must be granted, with \$10 costs.

SUPREME COURT.

THE PEOPLE, on the relation of DE LA FIGANIERE, agt. THE JUSTICES OF THE MARINE COURT.

There is no provision for a *motion for a new trial* before a *single judge at special term*, in the *Marine Court*, as in the *Supreme Court*.

But questions which form an application for a new trial, whether upon exceptions raising questions of law merely, or as against the *weight of evidence*, may be heard and determined by the *Marine Court* upon *appeal at general term*.

Appeals from the *Marine Court* to the *Common Pleas*, can only be taken on decisions of the *general term* of the *Marine Court*.

New-York Special Term, Sept., 1855.

APPLICATION for a mandamus, to compel the justices of the marine court to vacate an order made by them at general term, modifying a judgment on the verdict of a jury rendered in favor of the relator.

— — — — — *for plaintiff.*

A. A. PHILLIPS, *for defendants.*

CLERKE, Justice. The only power of review possessed by the justices of the marine court over their own decisions and judgments, is given by the act passed July 21, 1853. Previously to this they could not grant a new trial, or reverse their judgments; (*See The People agt. The Marine Court, 12 Wend. 220;*) but by this act they are authorized to appoint general terms, at such time as they may deem proper, and an appeal may be taken from a judgment entered by the direction of a single judge of the court to the justices thereof, at a general term, in the same manner, and with the like effect, as appeals in the supreme court from the decision of a single judge to the general term. There is no provision for a motion for a new trial before a single judge at special term, as in the supreme court; but it does not follow that a party cannot obtain a new trial by appeal to the general term, on the same grounds and for the same reasons for which a new trial could be obtained in the supreme court by motion.

The legal signification of proceedings on appeal does not import the review merely of questions of law; "appeal" signifies simply the removal of a cause from an inferior to a superior jurisdiction; and any question of fact or law, or both, may be the subject of appeal, or the whole facts or the whole case; as, for instance, appeals in summary proceedings to remove tenants; from the decisions of justices of the peace to the court of common pleas, or county courts. It is, indeed, now the substitute for a writ of error. But it is more; it is the method by which all the mistakes in the judgments of an inferior juria-

diction are rectified, except when otherwise specially provided. If a motion for a new trial before a single judge had not been expressly prescribed in the superior courts by § 265, those courts would have the right, from their inherent power of re-deliberation and review, to modify and reverse their judgments at general term, *for any cause*.

So the marine court, as a consequence of the new power invested in it by the act of 1853, to reconsider and review its judgments by appeal, without restriction or qualification, can, as it has done in the present case, vacate or modify its judgments on the ground of being against the weight of evidence, as well as if exceptions were taken at the trial, and the objections raised involved only questions of law. I am, therefore, of opinion, that in the absence of any provision in the act of 1853, requiring a motion for a new trial in the first instance, that the questions usually constituting grounds for such an application, can be heard and determined in the marine court on appeal at general term, and only in this way; and that the words in the act, "in the same manner and to the like effect," apply to the method of conducting the appeal, and to the results, and not merely to the grounds and reasons of the appeal.

It was urged by the counsel for the relator, that the power of review, given by the 5th section of this act, applies only to decisions on motions to open defaults. This would be contrary to the whole tenor and evident aim of the act, extending the jurisdiction, remodeling the organization of the court, and investing it with new and unrestricted authority to hold a general term. Whatever may be the obscurity of part of the language of § 5, I cannot suppose that the legislature intended that all this new machinery was designed exclusively for cases of default.

In answer to the remark, that the defendant ought to have applied to the court of common pleas for a new trial, I am of opinion, that appeals from the marine court to the court of common pleas, can only be from its decisions at general term. The action and deliberation of the inferior court must be always exhausted before the appellate court can entertain

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jurisdiction of the cause. In the language of Judge BRONSON, in *Gracie* agt. *Freeland*, (1 Com. 228,) commenting upon appeals from the supreme court to the court of appeals, "it is not to be presumed that the legislature intended the parties should go to the court of last resort, before they had obtained the judgment of the full bench in the court where the proceedings were instituted. We ought to find unequivocal words to that effect, before we give such a construction to the statute." And again: "If the party has a right to a hearing at the general term, then he should go there from the special term, instead of taking an appeal. The legislature could not have intended that there should be an appeal to this court before the matter had been finally disposed of in the court of original jurisdiction." The defendant, therefore, had no other remedy than an appeal, in the first instance, to the general term of the marine court; and the question was properly entertained there.

It is unnecessary to consider the other points discussed.

The application must be denied, with costs.

NEW-YORK COMMON PLEAS.

CARPENTER, appellant, agt. SECOR, respondent.

Where the assignor of a thing in action is examined by the plaintiff, (his assignee,) the defendant can only offer himself as a witness to the *same matter to which the assignor has testified*, and not to matter which does not controvert the facts testified to by such assignor, but goes in avoidance or discharge of the liability resulting from those facts.

Thus, where a plaintiff proves, by such assignor, the sale of a horse to the defendant, (to recover the price of which the action is brought,) it is not competent for the defendant to testify, on his own behalf, to a subsequent *payment* of the price, or to a *release* or *infancy*, or other matter, in avoidance of the legal consequence of the facts sworn to by the assignor. (*Code*, § 399.) Whether such *payment* might be testified to by the defendant, when the purchase and payment were simultaneous, and the assignor was examined to the transaction generally? *Quere.*

General Term, July, 1855.

Judges INGRAHAM, DALY, and WOODRUFF.

— — — — —, *for appellant.*

— — — — — *for respondent.*

By the court—WOODRUFF, Judge. The views expressed by this court in *Ward agt. Ingraham*, (1 E. D. Smith R. 538,) seem to me conclusive in the present case. Section 399 of the Code of Procedure provides that "when an assignor of a thing in action, &c., is examined as a witness on behalf of any person deriving title through or from him, the adverse party may offer himself as a witness *to the same matter*, and shall be so received."

This action is prosecuted by the plaintiff as the assignee of Thomas Law, to recover money due from the defendant for a horse, alleged to have been sold by Law to the defendant. On the trial, the plaintiff examined Law, his assignor, and proved by him the sale and delivery of the horse to the defendant, the price thereof, and the assignment to the plaintiff.

The defendant then offered himself as a witness on his own behalf; and to the three facts above mentioned he was plainly competent, i. e., in relation to the alleged *sale and delivery, the price*, and the *assignment*, he might testify, for to those matters the assignor had testified. But he was also offered to prove, and, notwithstanding the plaintiff's objection, was permitted to testify, that he *had paid for the horse* the full price; when such payment was made he did not state.

This was not the matter respecting which the assignor had been examined, but was new matter. Matter entirely consistent with the truth of all that the assignor had testified, and tending not to *controvert* the case made by the plaintiff's witness, but to establish a defence in avoidance of the plaintiff's case.

The object of the section of the Code referred to was to place the parties, in respect to any fact which might be within the

knowledge of the parties to the transaction only, so far upon equal ground, that if the plaintiff relied upon the assignor as to any fact in his case, the defendant might, as to such fact, controvert the evidence by his own oath. Thus, if the plaintiff relied upon the assignor to prove a sale, the defendant might testify to the matter of the sale; and so as to delivery, price, or any other fact on which his claim depends.

I do not think that, practically, the rule operates equally; and if the legislature had gone further, and applied to this examination the provisions of § 395, so that, when the assignor was examined, the defendant might testify to discharge himself of any liability resulting from the facts testified to by the assignor, it would seem to have made the rule more equitable; but such is not the meaning of § 399.

When a sale is proved, proof of payment is not the "*same*," but *new matter*.

The case of *Gardner agt. Clark*, (17 Barb. S. C. Rep. 588,) is in conflict with these views, and I exceedingly regret that on a subject of so great importance there should not be uniformity of decision. But, with a disposition to regard the opinion of the supreme court in that case with great respect, I have not been able to bring my mind to the conclusion, that our views of the construction of the Code in this particular are erroneous. To give full effect to the decision referred to is, in substance, to strike out of the section the words "to the same matter;" for, according to the opinion of Mr. Justice BACON, whenever an assignor is called and testifies to facts which charge the defendant with a liability, the defendant may testify to any other facts whatever, occurring at the same, or at any other time, which will operate either to controvert those facts or avoid their legal effect: *i. e.*, he may deny what the assignor testifies; or may show facts inconsistent with his evidence; or may avoid the liability cast upon him by testifying to independent matter,—as a *release, infancy, payment*, or statute of limitations, and the like. That is to say, the supreme court construes the section as if it meant, that when the assignor is called to establish the liability, the defendant may testify to any de-

fence. "The same matter," in this view, being not the facts to which the assignor testified, but the cause of action his evidence tends to establish, and every fact which will tend to defeat it.

In my opinion, the legislature have used the language in a more restricted sense, and with the same distinctions with which these terms, and their opposite are used in pleading. Thus § 147 refers to *matter* appearing in the *complaint*. Section 149 permits an answer which shall controvert the allegations in the complaint, or contain "a statement of *new matter*, constituting a defence or counter-claim." Formerly § 153 allowed a reply, whenever the answer contained *new matter*. (*Code of 1849*.) Now a reply is allowed when the *new matter* constitutes a counter-claim. Section 154, again speaks of "*new matter* constituting a defence," &c. Section 165 recognizes the distinction between the "matter charged" by the plaintiff and matter in mitigation, or justification, or avoidance. And § 168 again recognizes the same distinction, and shows that in the Code the term *new matter* has the same meaning that it had before the Code. If the terms "the same matter" and "new matter" have, when applied to pleadings, the same signification they have had heretofore, it seems to me clear, that when applied to evidence to be given under the pleadings, they must have the same signification. A party must, in his proof, be confined to his allegations.

Suppose a complaint avers a sale and delivery, and the answer contains two defences, the one a general denial of the facts charged, and the other a counter-claim, is there any doubt that the latter defence is to be deemed new matter in every sense, both for the purposes of pleading and proof? If so, and the assignor testifies to the sale, can the defendant be received to testify to the *new matter* constituting the counter-claim? I think not; nor to payment or release, or other new matter. The same distinction obtains in the rules governing the conduct of a trial. Thus a plaintiff, having rested his case, is not in general permitted, after the defendant's evidence is in, to go into matters not opened by the defendant's evidence; and if

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the defendant's evidence is confined to rebutting the very same facts or matters to which the plaintiff's witnesses have testified, the plaintiff cannot examine further witnesses.

The strikingly dissimilar language used by the legislature in sections 395 and 397, contrasted with 399, shows that they used the language of the last-named section in the sense we have given it. Thus, in § 395, it is provided, that "a party examined by the adverse party may testify on his own behalf in respect to *any matter pertinent to the issue*. But if he testify to any *new matter* not responsive to inquiries put to him, or necessary to explain or qualify his answers, or discharge him when his answers would charge himself, such adverse party may offer himself as a witness to such *new matter*, and shall be received." This shows that the legislature, in this section, had distinctly in view the distinction between the same matter, elicited by the inquiries of the adverse party, and new matter; and that in this example they intended, expressly, to provide that a party so examined might not only give evidence touching the same matter thus inquired of, but might discharge himself when those matters would tend to charge him; while, on the other hand, when such adverse party offers himself, he is strictly confined to the new matter testified to. And in § 397, the legislature provide, that when a co-plaintiff or co-defendant is examined as a witness, the other plaintiff or defendant may offer himself as a witness to the "*same cause of action or defence*," showing in both these sections, not only a design to admit a wider range of examination, but also a plain recognition of the difference between an examination of the witness, or party to *the same matter*, and his examination to *new matter* on his own behalf.

The terms of § 399 confine the examination of the defendant to the *same matter*, testified to by the assignor, and do not (as is done in § 395) intimate that he may testify to any matter which will *discharge* him, when the evidence of the assignor would *charge* him, as Mr. Justice BACON obviously holds.

The legislature did not, I think, make use of language so widely different without intending to make a distinction; nor do I think they used the terms, "the same matter," without

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intending the very same matter to which the assignor testifies, and no other; otherwise, why did they use the words at all? If in any case this construction gives the plaintiff an undue advantage, we must regret it, but we cannot, I think, provide the remedy.

It will rarely be true, when a sale and payment are part of the *same transaction*, that the assignor can be so examined by the plaintiff as not to open the door to the defendant to testify to *all* that took place at the time: for, if leading questions are not permitted, and the assignor is examined in relation to the transaction between himself and the defendant generally, it would seem, even under the view I have above expressed, that the *whole transaction* would be the matter testified to, and that the defendant could testify to the whole. But, be this as it may, I cannot find warrant for saying that he may testify to other facts, occurring at another time, forming no part of the transaction testified to, merely because the legal effect of the assignor's evidence is to charge him with a liability, which he can only avoid by showing subsequent payment, release, or by testifying to his infancy, or other matter entirely consistent with what the assignor has sworn to, but going to new matter in avoidance.

I am of opinion that the judgment should be reversed.

Judgment reversed.

SUPERIOR COURT.

FORSYTH agt. JOHN and JAMES EDMINSTON.

A complaint, whose allegations contain the substance of several distinct causes of action, must be so constructed that the causes of action will be separately stated, and plainly numbered. In an action on the case, in nature of a conspiracy, the *damage* is the ground of the action, and not the *conspiracy*. One may be sued alone. If several be sued jointly, there may be a verdict and judgment against one, although there be a verdict in favor of the others. If a complaint, in such a case, state facts, which constitute several causes of ac-

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tion, on either of which the plaintiff can recover, though he should fail as to all the others, the court will order it amended, so as to state the causes of action separately.

A defendant should not be embarrassed, by being obliged to so draw a distinct and separate part of an answer, as to present a full defence to several causes of action. He has a right, and proper pleading requires him, to so frame his answer, that each defence shall be separately stated, and so refer to the cause of action it is intended to answer, that it may be intelligibly distinguished. (*Code*, § 150, *sub. 2*.)

At Chambers, Oct. 6, 1855.

THE defendants move for an order, requiring the plaintiff to so amend his complaint as to make it more definite and certain, and so as to state separately the causes of action contained in it, and to plainly number them, and for other relief.

The plaintiff insists that it contains but a single cause of action, and that it is an action on the case, in the nature of conspiracy.

The complaint states, that on and prior to the 9th of August, 1855, the plaintiff was, and since has been, a merchant in New-York city, in good credit and solvent; that a dispute existed between the parties in respect to transactions between them, and the liability of the plaintiff on a note made by him and held by the defendants; that defendants sued him in the supreme court, and by a verified answer he denied the allegations of the complaint, and filed an affidavit of merits; that while plaintiff was absent from the city, defendants, without noticing the cause for trial, "and contriving and intending to injure the plaintiff, destroy his credit, and break up his business, on said 9th of August, 1855, fraudulently, maliciously, and without law or right," and without the knowledge of plaintiff or his attorney, and knowing their proceedings to be irregular, caused a judgment to be entered against him for \$2,175.98, and docketed the judgment in, and issued executions to the counties of New-York and Kings, and levied on his property in both counties, and deprived plaintiff of the use of his property, until the judgment and executions were set aside, and subjected him to expenses in procuring them to be set aside.

Plaintiff further says, that the defendants in the further pros-

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ecution of their malicious intent to injure him and destroy his credit, immediately on the books of the commercial agency, "maliciously caused to be written and published, and recorded of and concerning the plaintiff and his business and credit, a false and malicious and libelous record and publication, to the effect, that the plaintiff's credit was so impaired that he was not fit to be trusted, that he had failed to pay his debts, that a judgment had been obtained against him to the amount of \$5,000, which could not be collected by reason of his insolvency; and with like malicious intent, caused copies of said libelous record to be circulated among sundry of the merchants of said city; and did falsely and maliciously represent, publish, and declare of and concerning the plaintiff and said record, and said judgment, that his credit was gone, that he had failed to pay his debts, and that they had a judgment against him which he was unable to discharge, and had not property sufficient to satisfy; all which publication, record, representations, and declarations of the defendants were made by them in combination with each other, and acting in concert in respect thereto, and were false and malicious, and made with intent, by impairing the plaintiff's business and credit, to obtain for the house of which they were partners his business and profits, and intended greatly to injure, and did greatly injure the plaintiff in his character," &c. It prays judgment for \$10,000 damages.

ASA CHILD, *for plaintiff.*

JOHN TOWNSEND, *for defendants.*

BOSWORTH, Justice. The rules applicable to a *writ of conspiracy*, properly so called, are not applicable to actions on the case, in nature of a conspiracy. The latter are actions of *tort*, and are controlled by the general principles which regulate all actions of tort brought to recover damages. The *damage sustained* by the plaintiff is the ground of the action, and not the conspiracy. It may be brought against one person alone. If brought against several, all but one may be acquitted, and the plaintiff may have a verdict against one only.

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When several conspire, and agree upon measures to be pursued to injure another, and such measures are taken in pursuance of, and in execution of such preconcerted arrangements, and damage results, all may be sued, and what one did in execution of the scheme may be alleged to be the act of all, and all will be charged with the consequences.

But where all directly participate in wrongful acts which produce damage, if they are acts which in judgment of law may be committed by several jointly, a recovery may be had in one action against all, though no conspiracy be proved. And even when it is alleged that all the defendants conspired, if it appear that there was no conspiracy, and that what was done was the act of one only, a verdict may be had against him, and in favor of the others.

Proof, in this case, of the facts alleged, in relation to entering judgment against the plaintiff, and issuing executions against his property, and levying upon it; with the intent stated, and knowing the proceedings to be irregular, would entitle the plaintiff to recover, although he might fail to prove the other allegations of the complaint.

So, proof of entering upon the books of the commercial agency, the statements charged to have been there entered, and printing and circulating copies, would establish a cause of action.

So, proof of the verbal representations, said to have been falsely and maliciously made, of the plaintiff as a merchant, and of his standing and credit, with the consequences charged to have resulted, will establish a cause of action. Whether one would lie against the defendants jointly for this cause alone, without alleging and proving a conspiracy, in pursuance of which the representations were made, it is now unnecessary to decide.

It is obvious, that the complaint states the substance of three several causes of action.

They should be separately stated, (*Code*, § 167,) and plainly numbered. (*Rule* 86.)

Stating the causes of action separately is indispensable to

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appropriate and safe pleading on the part of the defendants. To one cause of action there may be no defence, and yet there may be a good one to each of the others. But those defences may be entirely different in their character. The complaint should be so framed that the appropriate answer to either cause of action may be separately stated in the answer.

The rules applicable to an action on the case, in nature of a conspiracy, are clearly and fully stated in 1 *Sand. R.* 230, note 4; and in *Tappan et al. agt. Powers, Davis, and Lawrence*, (2 *Hall*, 277-296.) See *Jones agt. Baker*, (7 *Cow.* 445.)

The motion must be granted, with \$10 costs to defendants, to abide the event of the action.

SUPREME COURT.

SALLOW S. LAKIN, appellant, agt. THE NEW-YORK & ERIE
RAILROAD COMPANY, respondents.

It is improper to *move for an order* referring a cause back to a referee to make a further or supplemental report, stating whether certain facts were proved before him or not, where it appears from the referee's report that he has passed upon all the facts necessary to a decision of the cause, and has stated those facts in his report, agreeably to § 272 of the Code.

It would be, substantially, granting a new trial in fact, without power to hear the parties on the testimony.

After the referee has made his report on the facts and conclusions of law, the only thing for the court to do is to examine and determine,

- 1st. Whether he has passed upon all the material issues made by the pleadings.
- 2d. Whether his finding on each of the questions of fact is supported by the evidence; and,
- 3d. Whether the legal conclusions from the facts are in accordance with the law of the land

• *General Term, 6th District, Cooperstown, July, 1855.*

THIS was a motion made at January term, 1855, for a rule or order referring it back to H. Ballard, Esq., sole referee in this

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cause, to make a further or supplemental report, stating whether certain facts were proved before him or not.

T. H. WHEELER, *for appellant.*

WHEELER & MORE, *for respondents.*

By the court—SHANKLAND, Justice. It is not pretended that all the evidence given on the trial is not embodied in the case made and settled, or to be settled; but it is claimed that the referee has omitted to pass upon all the facts proved on the trial, and necessary to be stated in order to determine the rights of the parties; but a careful examination of the pleadings and report of the referee convinces me that he has passed upon all the facts necessary to the decision of the cause, and has stated those facts in his report agreeably to § 272 of the Code.

The main issue to be tried was, whether the defendants had so constructed their bridge across the Delaware river *as not to impair its usefulness*, or, in the language of the general railroad act of 1850, whether the defendants restored said river to its former state, or to such a state as not unnecessarily to impair its usefulness." The referee finds, as matter of fact, "that the bridge is so constructed as not materially to injure the free navigation of the river with rafts, in time of an ordinary freshet, for running lumber, when such rafts are conducted with proper skill and care; and that defendants did sufficiently restore said stream to its former state, so as not to have impaired its usefulness for the navigation of rafts of lumber in times of ordinary freshets for running lumber, and when such rafts are conducted with proper skill and care." Whether the facts found by the referee warrant the conclusions of law drawn by him therefrom is not to be determined in this motion; that question will arise and must be met on the argument, on the motion to reverse the judgment entered on the report. Whether the qualified finding of the referee as to the degree in which the stream was restored to its former state of usefulness comes up to what the statute requires will then be in order.

If the defendants restored the stream to its former state of

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usefulness, they are not liable for any damage to persons navigating the same from whatever cause arising. It matters not, therefore, whether the plaintiff's rafts were manned with expert and careful hands or otherwise, nor whether they used ordinary or extraordinary skill in navigating said rafts on the occasion in question. I repeat, the great essential fact to be ascertained was, whether the defendants restored said stream to its former state of usefulness.

The inquiry as to the manner in which the rafts were navigated was material only in determining the great question before mentioned, but was not necessary to be mentioned in the report; and if it had been expressly found that the rafts were navigated with ordinary care and skill, it would not have changed the result, because the accident may have been the result of inevitable accident; or the stream, prior to the erection of the bridge, may have required extraordinary skill to run it in safety at the place where the bridge is erected. But, as a question of practice, it seems to me improper to ask for an amended report from a referee, on motion, in a case like this.

If the referee has neglected to find all the issues referred to him, and necessary to the determination of the action, the remedy should be a motion for a new trial, like the old practice of issuing a *venire facias de novo*, where the verdict, whether general or special, was imperfect by reason of some uncertainty or ambiguity, or does not find the whole matter put in issue. (2 *Dunlap's Practice*, 698, 656; 4 *J. R.* 213; 2 *id.* 210.)

If we should grant this motion, it would substantially be referring back the cause to the referee, to adjudicate upon points which he neglected to pass upon on the former hearing. In short, it would be granting a new trial in fact, without power to hear the parties on testimony. I am certain this cannot be done. After the referee has made his report on the facts and conclusions of law, the only thing we can do is to examine and determine,

1st. Whether he has passed upon all the material issues made by the pleadings.

2d. Whether his findings on each of the questions of fact is supported by the evidence.

8d. Whether the legal conclusions from the facts are in accordance with the law of the land.

If the referee has erred in either of these particulars, we must grant a new trial, or other appropriate remedy. I am of opinion that the referee has passed upon all the material issues in this case; and that, at all events, the party's only remedy is to bring on his appeal to argument; and if it there appears that all the issues made have not been passed upon, or the report is ambiguous, or the legal conclusions from the finding are erroneous, then a new trial is the proper remedy to be granted.

This motion asks for a remedy which is inappropriate, and should be denied, with \$10 costs.

SUPREME COURT.

PAGE and others agt. BOYD.

Where goods are purchased from A, at the request of B, who holds them as trustee, to sell and pay certain of the proceeds to C. B has the legal and equitable title in the goods. C has but an equitable title in the *proceeds*; and only in part of those.

In such a case, it cannot be said, as matter of law, that the purchase is made by C, as principal, through B, his agent. B is not agent but principal. C is neither principal, nor owner, nor buyer, in any sense.

Where, in such case, it was averred, substantially, that C had paid to A a large share of the purchase money for the goods, and had promised to pay the remainder if B would authorize it; which B had not done, except inferentially, *held*, that these were not such facts as constituted a statement from which the law alone, without the aid of a jury, would draw the conclusion that the purchase was made for the benefit of C. They were partial *evidence* of such a fact or state of things, but not an averment of such a fact.

New-York Special Term, March, 1855.

DEMURREE to complaint.

The complaint alleges that the plaintiffs, at the request of one

Mallon, expended large sums of money, amounting to \$9,075.34, in the purchase of merchandise, which was placed in a schooner to be conveyed to Kingston, Jamaica; and that for making the purchases and their services, they were entitled to be paid the sum so expended, and \$227.71, of which the defendant had notice. It then adds, that the merchandise put on board the vessel belonged to the defendant, and not to Mallon, "but were held by Mallon as trustee, to sell the same, and pay over certain of the proceeds thereof to the defendant. That the defendant has since paid \$7,500 on account of such advances and commissions, but not the remainder thereof; that the plaintiffs drew their draft for such remainder on the defendant, which he *refused to accept*, but he promised to pay the same, if on hearing from Mallon he should authorize such payment: that Mallon did authorize such payment, and drew his draft in favor of the plaintiffs on the defendant for the amount, which the defendant refused to accept.

The defendant demurs to the complaint.

— — — — — *for defendant.*

— — — — — *for plaintiff.*

MITCHELL, Justice. There are some general statements in the complaint which are evidently qualified, and intended to be qualified by subsequent parts; and they must be taken accordingly with such qualification, and not as absolutely as if the qualification were not added. Thus it is said that Mallon did authorize the payment of the first draft, and drew his draft in favor of the plaintiffs on the defendant for the amount. This evidently means that he authorized the payment by drawing the second draft, otherwise there was no need of referring to the second draft. This being so it is plain that the authority which the defendant wanted was not furnished to him, which was an authority to pay the first draft. The payment by the defendant of the second draft would be *prima facie* evidence that he had so much funds of Mallon's in his hands, and in no way an authority from Mallon to pay the first draft.

So the allegation, that the merchandise was not the property of Mallon, but of the defendant, is explained by what follows, stating why it was not Mallon's, namely, that "it was held by Mallon, as trustee, to sell, and pay over certain of the proceeds thereof to the defendant."

The facts, then, admitted by the complaint are, that the plaintiffs made the advances at the request of Mallon, who (at some time—perhaps even after the purchase was made—for the complaint does not say when) held the same as *trustee*, to sell the same, and pay over *certain* of the proceeds thereof to the defendant, and that the defendant has paid \$7,500 on account, and has promised to pay the rest if Mallon would authorize it, which Mallon has not done. If the same facts were shown to a jury, and the trust were concealed, this might be evidence from which they might infer that the purchase was made by Mallon as the agent of, and for the benefit of the defendant, and they might have found the defendant liable. But still they are not such facts as constitute a statement from which the *law* alone, without the aid of a jury, draws the conclusion that the purchase was made for the benefit of the defendant; they are partial evidence of such a fact or state of things, but not an averment of such a fact. A jury may be bound to find a vessel unseaworthy when she commenced her voyage, if she founders at sea on the day of leaving the port, without any collision or any storm, or any visible cause; but the averment of these last facts in an answer, would not be an averment that she was unseaworthy when she commenced her voyage.

The proof that the defendant paid \$7,500 of the plaintiff's claim would be partial proof of his admission of his liability for the goods purchased; but, when stated in a pleading, it is no averment of the fact that he was so liable. If it were received as such evidence, then it would be proper for the defendant to answer in the same way, and instead of taking issue on the issuable fact, whether the goods were purchased for his account, to set forth his evidence to explain why he paid that money, and state also any other evidence in his defence. The fact of the payment must, therefore, be disregarded. The facts as

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alleged, then, are that the goods were bought at Mallon's request, and that he, at some time, held them as trustee, to sell, and pay *certain* of the *proceeds* to the defendant. This would show that Mallon, and not the defendant, had the legal title in the goods; that the defendant had not even an equitable title in the goods, but only in the proceeds thereof; and not in the whole of the proceeds, but only a part thereof.

When a purchase is made by one who is to have the legal title in the goods bought, and another is to have no title in the goods, but only in the proceeds, it cannot be said, as matter of law that the purchase was made by that other as principal, through the first as his agent. The first was not agent, but principal; and the last was neither principal, nor owner, nor buyer, in any sense. Whether the *cestui que trust* might not be liable in equity, if he obtained possession of the goods, or of their proceeds, is a question not raised here.

From all that appears here, Mallon may have sold all the goods and retained the proceeds, and the defendant have paid his \$7,500 without receiving any benefit for it.

The demurrer is allowed with costs, with leave to plaintiffs to amend in twenty days on payment of costs.

SUPREME COURT.

IN THE MATTER OF DANIEL S. BAKER.

It is not allowable, on *habeas corpus*, to inquire into the regularity of the proceedings upon which process is based, or the sufficiency of the evidence, or accuracy of the decisions in those proceedings, not affecting the jurisdiction of the court or officer issuing the process. Defects in such particulars can be corrected only on *writ of error* or *certiorari*.

The proceedings authorized by 1 R. S. 125, §§ 51, 52, and 53, to compel the delivery of books and papers, by public officers to their successors, are applicable, as against officers *de facto*, only, to cases where the title of the relator to

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the office is clear. If the title is not clear, the remedy is by action in the nature of a *quo warranto*.

If an officer, acting under these provisions of the statute, applies them to cases to which they do not extend, he transcends his jurisdiction, and his acts thus far are void.

The statement of the result of the canvass of votes given at a town meeting, held for the election of town officers, entered by the clerk of the meeting in the minutes of the proceedings kept by him, as required by 1 R. S. 344, § 9, is intended by statute as the certificate and evidence of election.

Proceedings, under 1 R. S. 125, § 51, were instituted upon the petition of P. against B. before the county judge of Ontario, to compel B., who had been supervisor of West Bloomfield, to deliver the books and papers of the office to P., his successor. The petition set forth that, at the close of the canvass at the town meeting, a statement of the result was entered in the minutes, which stated that P. was elected supervisor, and that the names of P. and B. were entered on the poll list as voters; that P. took the official oath as supervisor before the town clerk, who certified the same, and it was filed in the town clerk's office; and that P. thereupon entered upon the duties of the office. B. appeared before the county judge, and interposed an answer to the petition, verified by his oath, setting up various irregularities in the election, but did not controvert any of the facts above stated. *Held*, that these facts stated in the petition, being uncontroverted, established *prima facie*, that P. was entitled to the office; that B. could not, in the summary proceedings against him, go behind these facts, and attack the election for irregularity; and that inasmuch as the only matters alleged by B., to impeach the title of P., related to the regularity of the election, his *prima facie* title was clear and free from reasonable doubt.

It seems that, in proceedings under 1 R. S. 125, § 51, the existence of facts constituting a *prima facie* title may be controverted, such as the making and entry of the statement in the minutes of the election, the alleged contents of the statement, and the taking of the oath, &c., and thereby so much doubt be created as to present a question of right beyond the jurisdiction of the officer. But alleged irregularities in the election can only be made available by an action analogous to a proceeding by *quo warranto*, instituted directly to try the title.

Where the justices of the peace, who presided at a town meeting, several days afterwards decided that the proceedings were illegal, in consequence of certain alleged irregularities, and that no choice had been made of town officers to be chosen, and the offices were therefore vacant, and thereupon the justices proceeded to appoint town officers. *Held*, that such appointment was void.

The return of the sheriff to the writ of *habeas corpus* stated that the imprisonment was by virtue of a warrant issued by the county judge in the proceeding above stated. The warrant did not show that there was any adjournment or continuance of the proceeding from the 14th of April, when the order to show cause was returnable, and the answer was put in, to the 30th of April, when

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the warrant was issued. *Held*, that no want of jurisdiction thereby appeared.

Held, further, that parol proof of a continuance was receivable if necessary to supply the omission of a recital of such facts in the warrant.

Assuming that there was no formal adjournment or continuance, the decision and warrant were for that reason, at most, merely erroneous: the error did not affect the jurisdiction of the judge, and would not be regarded on *habeas corpus*.

On *habeas corpus*, to the sheriff of Ontario county, to be relieved from imprisonment.

The case was heard at the court-house in Canandaigua, the 15th of May, 1855.

The return of the sheriff to the writ stated, that the imprisonment was by virtue of a warrant, issued by CHAS. J. FOLGER, county judge of Ontario county, a copy of which was annexed.

The warrant, under the hand and seal of said judge, recited in substance, that on the 11th of April, 1855, Thomas R. Peck presented his petition in writing to said judge, setting forth, that at an annual town meeting, held in the town of West Bloomfield, on the 3d of that month, the said Peck was duly elected supervisor of said town; that at the close of the canvass at said town meeting, a statement of the result was entered at length, by the clerk of the meeting, in the minutes of its proceedings kept by him as required by law, and was caused by him to be publicly read to the meeting by one of the justices of the peace who presided at said meeting, the said clerk being unwell; that said statement set forth that said Peck was elected supervisor of said town; that the names of the said Peck and Baker were entered on the poll list as voters at said town meeting; that, on the 6th of April, the said Peck took and subscribed, before the town clerk of said town, the oath of office as supervisor, and the clerk certified the day and year the same was taken, which certificate was delivered by him to the said Peck, who, on the same day, caused the same to be filed in the office of said clerk, and entered upon the duties of the said office of supervisor; that the immediate predecessor of the said Peck, in the said office, was the said Daniel S. Baker; that the term of

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office of said Baker, as such supervisor, expired upon the said Peck being elected, and having qualified as aforesaid; that on the 7th and 10th days of said April, the said Peck demanded of said Baker, personally, all the records, books, and papers in his possession and under his control belonging to said office, but the said Baker refused to deliver to him the same or any of them; and that at the time of making the complaint, the said Baker had in his possession or under his control divers records, books, and papers belonging to said office, and had wholly neglected to deliver them, or any of them, to the said Peck, and to make oath as to whether he had any, or what records, books, and papers belonging to such office in his possession or under his control; and in and by which said petition, the said Peck prayed for an order in pursuance of the statute, to be directed to said Baker, requiring him to show cause why he should not be compelled to deliver said records, books, and papers to the said Peck; which petition, and the facts therein stated, were verified by the oath of the said Peck; and the petition was accompanied with an affidavit verifying the demand on the 10th of April, and the refusal to deliver said records, books, and papers; that the said judge was satisfied by the oath of the said Peck, and the said affidavit, that said books and papers were withheld, and did thereupon grant an order directing the said Baker to show cause before the said judge, at his office in the village of Geneva, on the 14th of April, at 2 o'clock, P. M., why he should not be compelled to deliver the records, books, and papers in his possession, or under his control, belonging to the said office, to said Peck; and directing that a copy of said petition, affidavits, and order be served on said Baker, personally, on or before the 12th of April; that, at the time and place for that purpose named in said order, the said Peck and Baker personally, and by their counsel respectively appeared before said judge, and due proof having been made of the service of said order, the said judge proceeded to inquire into the circumstances; and the said Baker did not then, or at any other time, make affidavit before the said judge, that he had truly delivered over to the said Peck, or to any

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other person, all such books and papers in his custody, or appertaining to the said office, within his knowledge; and that it appeared to said judge that said books and papers were withheld; after which recitals it was stated in said warrant:—

“Now, therefore, by virtue of the statute in that case made, I, the said judge, do, in the name of the people of the state of New-York, command the sheriff of the said county of Ontario, to commit the said Daniel S. Baker to the jail of the said county, there to remain until he shall deliver such books and papers, or be otherwise discharged according to law.

“Given under my hand and seal, at Geneva, in the said county, this 30th day of April, 1855.”

In answer to the return of the sheriff, the said Baker presented an affidavit, stating that at the time of his appearance before the said county judge, on the 14th of April, in pursuance of the order theretofore made, he interposed an answer, duly verified by his oath, to the petition of the said Peck, and delivered the same to the said judge—a copy of which answer was annexed to said affidavit—and therefore objected that the said judge had no right or jurisdiction to hear, try, and determine the question in dispute and issues between him and the said Peck; that on the hearing before said judge, no evidence, testimony, or affidavit was taken, made, or introduced by either him or the said Peck, other than the petition and affidavit annexed thereto, and the answer of him the said Peck; that the hearing and arguments of counsel of the respective parties were had on those papers alone; that there was no adjournment or continuance of the proceedings before the county judge from the 14th to the 30th of April; and that at the close of the hearing before the county judge, he, the said Baker, understood the proceedings were ended and returned home, and that he heard no more of the matter until he was arrested on the 1st of May, instant.

The answer to the said petition was addressed to the said county judge, and was, in substance, as follows, 1st. It denied

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that the said Peck was then, or ever, supervisor of West Bloomfield, or that he was, on the 3d day of April, 1855, or at any other time, duly elected, or otherwise constituted or appointed such supervisor, or that he ever acted, or had a right to act as such. 2d. It denied that the said Peck was then, or ever in law or in fact, the supervisor of said town, or that, as such supervisor, or otherwise, he was then, or ever, entitled to the books and papers belonging to such office. 3d. It stated that the said Baker then was, and for more than one year last past had been, supervisor of said town, and that during all that time he had been, and then was, justly entitled to the possession, custody, care, and control of all the books and papers belonging to said office. 4th. It alleged that, at the annual town meeting in said town, on the first Tuesday of April, 1854, the said Baker was, by the greatest number of votes, chosen and elected supervisor of said town for one year, and until another should be elected or appointed in his place; that immediately thereafter he accepted the office, took the oath of office, and entered upon the discharge of the duties of the office, and ever since had continued to, and then did, discharge the duties thereof; and that, since the day of the said election, no other person had been duly elected or appointed to said office. 5th. It set forth that, at the day and place for the holding of the last annual town meeting in said town, three of the justices of the peace of said town were present, and presided at said meeting, and after the transaction of some other business by the electors present, the said justices proceeded to receive the ballots of the electors for the several officers to be chosen by ballot, without making any proclamation of the time when the polls would be closed, or the meeting would adjourn; that after keeping the polls open about two hours, the justices closed the ballot box and took it away from the place of meeting, without any adjournment or any motion, proclamation, or notice; that about two hours elapsed before said ballot box was again opened, during which time several persons appeared for the purpose of voting, but were unable to do so for the reason stated; that the ballot box was not, during that time, in the possession or under

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the control of the said justices, or any of them, but the same and its contents were taken away by a person who was a candidate for an office at said meeting, and deposited in another room in the building, then occupied as a tailor shop, and there left by him, unprotected and unguarded, for a considerable time; that the polls were, between 1 and 2 o'clock, P. M., again opened, without proclamation or motion, and were closed again nearly an hour before sunset on the same day, before several persons, who came for the purpose and with the intention of voting, had been able so to do; that on counting the votes found in said box after it was finally closed, the whole number did not correspond with the number of names of voters on the poll list; that in consequence of these and other irregularities, the justices afterwards decided that the proceedings were illegal, and no choice had been made of town officers to be chosen, and the offices were therefore vacant; and the justices, on the 11th of April, proceeded to appoint, by a written appointment under their hands and seals, town officers—a copy of which appointment is annexed to the answer, showing, among other things, that the said Baker was appointed supervisor; that the said Baker accepted the office, and on the same day took the oath of office, and entered upon the duties thereof, whereby he was duly and legally appointed to the office of supervisor of said town for the present year, and justly and legally entitled to hold the office. 6th. It stated that both the said Baker and Peck were candidates for the office of supervisor at said town meeting, and voted for by some of the electors; that the said Baker received a majority of all the votes fairly and legally cast at said meeting for that office, and was by reason thereof fairly and legally entitled to the office, and but for the said illegal proceedings would have been declared elected thereto. 7th. It alleged that, from his election as supervisor in April, 1854, to the 11th of April, 1855, the said Baker held the office by virtue of said election, and afterwards by virtue of said appointment; that ever since the first Tuesday in April, 1855, he had been the acting supervisor of that town, and actually discharged all the duties of the office; that during all that time

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he had by reason thereof been justly and legally entitled to the custody and control of all the books and papers appertaining to the office, of which the said Peck, before the issuing of the order had notice.

At the hearing on the *habeas corpus*, Judge FOLGER was examined as a witness on the part of the sheriff, and testified in substance, under an objection by the counsel of the said Baker to any evidence conflicting with what appeared on the face of the warrant of commitment, that the issue was joined at Geneva; that the matter was adjourned to the 20th of April, at Canandaigua; that at the close of the argument before him he stated he would take a few days to consider the case, if no objection was made; that none was made; that one of the counsel for the relator asked if it was best to adjourn to any particular day; the witness stated just as they saw fit; that it was not necessary, as he could inform the prevailing party by letter, when he had made his decision; that no objection was taken to that course; that before issuing the warrant he wrote to the counsel of the relator, stating the decision and ground of it, and requested him to inform the counsel of the other party.

S. V. R. MALLORY and J. A. SPENCER, *for Baker*.

E. G. LAPHAM and J. C. SMITH, *for sheriff*.

T. R. STRONG, Justice. The only questions which legitimately arise in this case, relate to the jurisdiction of Judge FOLGER to issue the warrant under which the imprisonment in question exists. If it does not appear that such jurisdiction was wanting, the relief sought must be denied.

It is not allowable, on *habeas corpus*, to inquire into the regularity of the proceedings upon which process is based, or the sufficiency of the evidence, or accuracy of the decisions in those proceedings, not affecting the jurisdiction of the court or officer issuing the process. Defects in such particulars, so far as there is any remedy on account of them, can be considered and corrected only on writ of error or certiorari. Colorable authority

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to issue the warrant in the present case, is all that is requisite to sustain it. These views are not controverted by the counsel for Baker, and they are fully sustained by numerous authorities. (2 R. S. 568, § 41; *The People* agt. *Cassels*, 5 *Hill*, 164; *In the matter of Prime*, 1 *Barb. S. C. R.* 340; *Bennac* agt. *The People*, 4 *Barb.* 31; see 3 *Hill*, 661-666, in notes and cases there referred to.)

The first ground upon which jurisdiction of the warrant is assailed is, that there was no continuance or adjournment of the proceedings before the county judge, from the 14th of April, when the order to show cause, granted upon the petition, was returnable, and the answer of Baker was put in. The warrant was issued on the 30th of April: it does not appear on its face that there was any continuance or adjournment from the 14th; and it is insisted that, without a continuance or adjournment, the proceedings terminated on the 14th; that as the warrant does not show a continuance or adjournment, none can be intended; and that parol proof could not be received to establish that there was one in fact, and supply the omission.

I am not able to assent to the position that jurisdiction is disproved by the absence of a recital in the warrant of a continuance of the proceedings; on the contrary, I am satisfied, that without such a recital, and without any parol proof on the subject, no want of jurisdiction thereby appears. It was not necessary that all the facts requisite to the jurisdiction of the officer should be disclosed by the warrant.

In *Seaman* agt. *Duryea*, (1 *Kernan*, 324,) it was held that process of commitment, issued by a surrogate, for a neglect or refusal of a guardian to comply with a decree made in proceedings against him before the surrogate for an account, need not recite all the facts and proceedings necessary to confer jurisdiction. The court say, in reference to it, "It was issued in a matter, and recited proceedings over which the surrogate had jurisdiction, and it is not necessary that the process should recite all the proceedings. The cause is substantially stated, which is sufficient. (*People* agt. *Nevins*, 1 *Hill*, 154.) If there was a jurisdictional defect in the proceedings, it should be

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shown by the party complaining of them." (*Bennac* agt. *The People*, 4 Barb. 31.)

In *The People* agt. *Nevins*, (p. 159,) COWEN, J., says, "On *certiorari* to remove a summary conviction before a magistrate, though a criminal case, the superior court will intend that he had acquired jurisdiction by the proper notice, or other form adapted to the nature of the case." (*See also Hart* agt. *Seixas*, 21 Wend. 47, and cases cited.) This goes much further than the present case calls for, to uphold the jurisdiction of the warrant. I am also of the opinion, that parol proof of a continuance was receivable, if necessary to supply the omission of a recital of the facts in the warrant. Such proof does not contradict the warrant; it simply supplies a fact as to which the warrant is silent, and I do not perceive any good reason why the warrant in such a case may not be aided by parol in respect to like facts.

The proof given shows that the proceedings were duly adjourned from the 14th, when the meeting was at Geneva, to the 20th of April, at Canandaigua, at which time and place the argument was had; that at the close of the argument, with the assent of the parties, the decision was postponed for a few days, to allow of further consideration of the case, it being arranged between the judge and the counsel, that on making his decision he would write to the prevailing party, informing him thereof. This postponement and arrangement were binding on the parties, and the decision and issuing of the warrant without appointing another meeting, was not, I think, even an irregularity.

But there is another decisive answer to the point under consideration, which is, that assuming there was no formal adjournment or continuance, the decision and warrant were for that reason, at most, merely erroneous; the error did not affect the jurisdiction of the judge, and would not be regarded on *habeas corpus*. There was no proof of a formal or intentional abandonment of the proceeding, and the utmost that can be claimed is, that the judge, without any announcement of his design to do so, took time to decide the case.

In *Horton* agt. *Auchmoody*, (7 Wend. 200,) it appeared that

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a justice of the peace granted an adjournment to a plaintiff in a suit before him when he had no right to do so, and afterwards rendered judgment against the defendant in his absence: it was held that the judgment, although erroneous, was not without jurisdiction, and therefore void; that the case was one simply of an error in the exercise of jurisdiction.

In *Hard agt. Shipman*, (6 Barb. 621,) it was held that a justice, having acquired jurisdiction of a cause and the person of the defendant, did not lose it by erroneously adjourning the cause to the 26th, instead of the 22d, of July, contrary to the agreement of the parties; and that a judgment rendered by him in the suit against the defendant on the 26th, in the defendant's absence, was valid until reversed on *certiorari*. The principle of these cases appears to apply to the question under consideration. No question is made in respect to jurisdiction up to and including the 14th of April.

The remaining three points against the jurisdiction of the county judge to issue the warrant are reducible to one, viz.—That Baker was in, and held, the office of supervisor, by color of right, and was supervisor, at least *de facto*; that the question of right to the office, upon the respective claims of Peck and Baker, could only be tried by a direct proceeding in the nature of a *quo warranto*; and that, upon the answer coming in, the county judge no longer had jurisdiction of the proceeding. The provisions of the Revised Statutes, under which the proceeding before the county judge was had, are, (1 R. S. 358, § 5,) “Whenever the term of office of any supervisor or town clerk shall expire, and another person shall be elected or appointed to such office, it shall be the duty of such succeeding supervisor or town clerk, immediately after he shall have entered upon the duties of his office, to demand of his predecessor all the records, books, and papers under his control belonging to such office.”

“§ 7. It shall be the duty of every person so going out of office, whenever thereunto required pursuant to the foregoing provisions, to deliver, upon oath, all the records, books, and

papers in his possession, or under his control, belonging to the office held by him."

"§ 9. If any person so going out of office, or his executors or administrators, shall refuse or neglect, when thereunto lawfully required, to deliver such records, books, or papers, he shall forfeit to the town, for every such refusal or neglect, \$250; and it shall also be the duty of the officer, or officers, entitled to demand such records, books, and papers, to proceed to compel the delivery thereof in the manner prescribed in the 6th title of the 5th chapter of this act,"—(certain sections of which title are made applicable.)

The manner prescribed (1 R. S. 125, § 51) is, that the successor may make complaint to either of certain officers, and among others the county judge, "and if such officer be satisfied by the oath of the complainant, and such other testimony as shall be offered, that any such books or papers are withheld, he shall grant an order, directing the person so refusing to show cause before him, within some short and reasonable time, why he should not be compelled to deliver the same."

"§ 52. At the time so appointed, or at any other time to which the matter may be adjourned, upon due proof being made of the service of said order, such officer shall proceed to inquire into the circumstances. If the person charged with withholding such books or papers, shall make affidavit before such officer, that he has truly delivered over to his successor all such books and papers in his custody, or appertaining to his office, within his knowledge, all further proceedings before such officer shall cease, and the person complained against shall be discharged."

"§ 53. If the person complained against shall not make such oath, and it shall appear that any such books and papers are withheld, the officer before whom such proceedings shall be had, shall, by warrant, commit the person so withholding to the jail of the county, there to remain until he shall deliver such books or papers, or be otherwise discharged according to law."

The proceeding authorized by these provisions is of a very summary character, and obviously was intended to be applica-

ble as against officers *de facto*, only to cases where the title of the relator to the office is clear. If the title is not clear, the remedy is by action in the nature of a *quo warranto*, which is the ordinary remedy for the trial of the title to offices and franchises, the right to which is in dispute, and in which the trial may be by jury, and the usual modes of reviewing decisions are allowed.

In *The People agt. Stevens*, (5 Hill, 616-629,) which was an application for a *mandamus* by one claiming to be clerk of the common council of the city of Brooklyn, to compel his predecessor in office to deliver to him the books and papers, BRONSON, J., says, "If the relator wishes to try the right to the office, it must be done by a *quo warranto*. If his title is clear, then he has a complete remedy by applying to a judge for an order to deliver the books and papers."

In a note to that case (631-634), is an opinion of KENT, circuit judge, in a case before him under the provisions above given, in which he discusses the question, and comes to the conclusion that, "an officer acting under the statute in question has no right to grant the order prayed for, unless the title of the applicant is clear and free from reasonable doubt."

In the matter of *Whiting*, (2 Barb. S. C. R. 513-518,) which was a proceeding under the same statute, EDMONDS, J., says, "The counsel for the defendant in these proceedings were right in saying that the question before me involved the title to this office, and that that title could be determined only on a *quo warranto*, and not in this summary proceeding. I can here only determine the right to the present possession of the office, and that on a *prima facie* case for the complainant." The counsel for the sheriff do not controvert, but assent to this doctrine.

The provisions of the statute being thus limited, if an officer acting under them applies them to cases to which they do not extend, he transcends his jurisdiction, and his acts thus far are void. If this be not so, there is no mode of confining the officer within the appropriate limits. He might try disputed titles in his discretion. So far as there is power in the officer to act,

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the exercise of that power is not even error. And if the trial of the title was erroneous merely, and not void, a common law *certiorari*, which is the only mode of reviewing the proceeding, would not reach the error.

Was then the title of the relator, Peck, to the office in question, clear and free from reasonable doubt? If it was, the warrant of the county judge is valid: if it was not, the warrant is void.

The statute, in relation to the election of town officers, (1 R. S. 344,) after providing for a canvass of the votes at a town meeting, proceeds:—

“§ 9. The canvass being completed, a statement of the result shall be entered at length by the clerk of the meeting, in the minutes of the proceedings to be kept by him as before required, which shall be publicly read by him to the meeting; and such reading shall be deemed notice of the result of such election to every person whose name shall have been entered on the poll list as a voter.”

It is stated in the warrant in question, that the petition presented to the county judge set forth that, at the close of the canvass at the town meeting, a statement of the result was entered in the minutes, which stated that Peck was elected supervisor, and that the names of Peck and Baker were entered on the poll list as voters; that Peck took the official oath as supervisor before the town clerk, who certified the same, and it was filed in the town clerk's office, and that Peck thereupon entered on the duties of the office. The recitals showed full compliance with the statute in regard to the election of supervisor, and the statement at the close of the canvass, and showed that Peck was duly elected, that he duly qualified, and entered upon his official duties. And none of these facts so recited were denied. As the case stood before the county judge upon the petition and answer, it appeared that all the evidence for which the statute has made provision of the election of a supervisor, showed that Peck was elected. The statement in the minutes is intended by statute as the certificate and evidence of the election.

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It cannot be disputed, I think, that the facts recited, which were uncontroverted, established, *prima facie*, that Peck was entitled to the office; and this *prima facie* title was clear and free from reasonable doubts, unless it was weakened and doubts were created by the matters alleged in the answer to impeach the title. Those matters related to the regularity of the election, and consisted of various irregularities and acts of misconduct, as omitting to make proclamation as to the time the polls would be closed, closing the ballot box for about two hours near the middle of the day, without any adjournment, motion, proclamation, or notice, allowing the ballot box to be taken from the room by a candidate for an office at the meeting, and leaving it unguarded, closing the box nearly an hour before sundown, and similar irregularities. If a *prima facie* title may be assailed in this way in such a proceeding, then undoubtedly a question was presented which the county judge had not power to try, and it was his duty to dismiss the petition.

The existence of facts constituting a *prima facie* title might, I am satisfied, be controverted, as the making and entry of the statement in the minutes of the election, the alleged minutes of the statement and the taking of the oath, &c., and thereby so much doubt be created as to present a question of right beyond the jurisdiction of the officer; but upon the best consideration I have been able to give to the question, in the brief time allowed me for making a decision, I am inclined to think that the respondent could not, in the summary proceedings against him, go behind these facts and attack the election for irregularity and misconduct, and thus divest the officer of jurisdiction. The only mode in which such facts can be made available, is by action analogous to the proceeding by *quo warranto* instituted directly to try the title. The remedy of Baker was to surrender the office, and the books and papers, and resort to such an action.

In *The People* agt. *Stevens*, before cited, NELSON, Ch. J., says, "On a proceeding by *mandamus*, involving a dispute as to which of two persons has been elected to an office—and indeed in any other proceeding involving the like inquiry, except

quo warranto, the regular determination of the board of canvassers is to be deemed conclusive upon the parties. The original merits, by which I mean the questions arising upon a canvass of the votes, cannot be thus reviewed; but the result, as finally certified and declared by the board, is controlling," and in support of which he refers to several cases.

In *The People* agt. *Jones*, 20 *Wend.* 81, 85, BRONSON, J., says, "It would lead to many evil consequences, if the person chosen, or any one else, was either required or permitted to go beyond the fact that the proper public officers have canvassed the votes, ascertained and declared the result in the forms prescribed by law. There is, indeed, one way in which the proceedings may be overhauled—by *quo warranto*."

In *The People* agt. *Vail*, (12 *Wend.* 12, 14,) BRONSON, J., says, "The decision of the canvassers was conclusive in every form in which the question could arise, except that of a direct proceeding by *quo warranto* to try the right." (*The People* agt. *Seaman*, 5 *Denio*, 409, 412, 413.)

It would seem to be best calculated to do justice to parties and promote the public interests, to give effect to the *prima facie* title to an office, whenever the facts proving it are not disputed, and the proceeding in which the question of title arises, whatever it may be, is one in which an inquiry into matters behind those facts is not allowable. A *prima facie* title is a good and sufficient title until overcome.

The appointment of Baker as supervisor by the justices was clearly void; and if I am right in the views above taken, as to the *prima facie* title of Peck to the office, Baker had not even a colorable title; and that he was supervisor *de facto*, of itself formed no objection to the proceeding against him. (*The People* agt. *Stevens*, 5 *Hill*, 633, *note*.)

My opinion upon the whole case is, that the imprisonment is not illegal, and that the party imprisoned should be remanded.

Ordered accordingly.

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SUPERIOR COURT.

M'QUADE agt. THE NEW-YORK & ERIE RAILROAD COMPANY.

When an action has been twice tried, the jury disagreeing on the first trial, and finding for the plaintiff on the second, and a new trial is granted to defendant on condition that he "pays the costs of the second trial,"—all a defendant is bound to pay is the costs of the term at which the second trial was had. He is not bound to pay the fees of plaintiff's witnesses for attending at a term, or circuit, intermediate those at which the two trials were had.

Nor should he be required to pay the amount of any per centage that may have been allowed to the plaintiff, on the coming in of the verdict. That is to be granted to the party who recovers final judgment: not to both parties, as might happen if treated solely as a compensation for the labor and expenses of a trial. It is not to be allowed but once. When granted, it is allowed to the prevailing party by way of indemnity for his expenses in the action; and as well for expenses in one stage of the action as in any other, down to the entry of judgment.

General Term, Oct. 1855.

OAKLEY, Ch. J., CAMPBELL, BOSWORTH, HOFFMAN, and SLOSSON, Justices.

THIS action was first tried in February, 1854, and the jury disagreed. It was noticed, and on the calendar for the following March and April terms. It was on the day calendar, and called in its order on the 27th of April, and the plaintiff not appearing, the complaint was dismissed. On the 17th of May an order was made vacating that dismissing the complaint, and directing the cause to be restored to the calendar and tried on the first Tuesday of June, 1854, or as soon thereafter as the same was reached; and also directing that the fees of the witnesses on the part of the defendants attending on the April trial term, and ten dollars costs of the motion, should be deducted from any recovery which might be had by the plaintiff.

The cause was placed on the calendar and tried in the June term, 1854—the trial commencing on the 18th and ending on the 17th of June—a verdict was rendered for the plaintiff. On the 17th of June, 1854, an allowance of \$175 was made in favor of the plaintiff.

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At the January special term 1855, the defendant moved for a new trial, which was denied, but without costs.

On the 8th of January, 1855, the plaintiff's costs of the action were adjusted. At the foot of the adjusted bill is this statement, viz. :

Costs adjusted at - - - - -	\$568.50
Allowances - - - - -	175.00
Costs of motions—(Oct. 10, 1854, \$10; Oct. 13, 1854,	
\$10,) - - - - -	20.00
Interest on judgment, \$3,000 - - - - -	122.50
	<hr/>
	\$886.00

On the 24th of January, 1855, judgment was perfected and a roll filed.

The defendant appealed to the general term, and in June, 1855, a new trial was granted, on condition that defendant "paid the costs of the second trial,"—the costs of the *appeal* being left to abide the event.

In the bill of costs, as adjusted on the 8th of January, 1854, there was allowed to the plaintiff, viz. :

For attendance of witnesses at the March term, 1854,	\$89.24
do. do. April term, 1854, -	91.24
For jurors' fees, clerk's fees, and fees for attendance of	
witnesses at <i>June term</i> , and a trial fee, - -	164.08

One hundred and sixty-four dollars eight cents have been paid and accepted in full of the costs of the *June term*.

The questions now presented are, *first*, whether the defendant is bound to pay more than the \$164.08, in order to comply with the terms of the condition on which a new trial was granted.

At the time they were paid, the counsel of the parties differed upon the question of the construction of the order as entered.

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They were paid under a stipulation that plaintiff might move the court for an order directing the costs of the March and April terms, and the allowance of \$175 to be paid. Plaintiff now moves for an order that they be paid in fifteen days, or, in default thereof, that the order granting a new trial be vacated.

L. E. BULKLEY, *for plaintiff.*

D. B. EATON, *for defendants.*

By the court—BOSWORTH, Justice. A new calendar was made for the term, commencing on the first Monday of April, 1854. That, by an order of the court, was continued through the months of May and June, and causes noticed for the May and June terms were placed at the foot of the calendar, as it stood at the beginning of those months respectively.

When a cause is tried, after having been noticed for circuits prior to that at which a verdict is obtained, and a new trial afterwards is granted on payment of costs, or of the costs of the trial; the only costs to be paid are those of the circuit or term at which the trial occurred.

When successive circuits or terms commence, as often occurs in this court, on the Monday succeeding the Saturday on which the next preceding one ended, if a cause should be on the day calendar at the close of one term, but not be actually reached until the next, it might be very proper to require a defendant to pay the costs of the necessary attendance of witnesses, for both of such terms. So, if there was such prospect of the cause being reached in the last week of a term, that common prudence would require witnesses, living out of the city, to be subpoenaed to attend, within that week, it might be proper to include, in the costs to be paid, the fees of the attendance of such witnesses, although the cause might not, in fact, be called and tried until the subsequent term.

But such a rule should not be applied to terms which are not for any purpose to be regarded as one term. There was one calendar for the January, February, and March terms. A

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new calendar was made up for April, which, by order of the court, continued the calendar of that, and of the May and June terms. There is no more connection in intendment of law between the March and April terms, nor under any orders or practice of the court, than between the January and June terms.

We think the costs of the March term cannot be allowed to the plaintiff under the decision of the court, nor according to the usual practice in respect to the costs to be paid in granting new trials.

The costs of the April term should not be allowed. The plaintiff was not only in default in not trying the cause at that term, which of itself is an answer to his claim to such costs, but he has been ordered, by an order still in force, to pay the fees for the attendance of the defendant's witnesses for the same term.

The court at general term did not intend to, and could not properly have altered the rights and liabilities of the parties with respect to such costs, so far as they are affected or fixed by the order of the 17th of May, 1854.

The only other matter to be considered relates to the allowance of \$175.

We understand that a per centage, when allowed on the ground that the case is difficult or extraordinary, is not merely to compensate for an actual trial, but for the skill and labor employed, and expenses incurred, from the commencement of the action to the recovery of judgment.

In some cases, full as much professional labor and skill are requisite in the proceedings prior to the notice of trial, as upon the trial itself.

The allowance of a per centage depends upon a judgment being recovered, and is to be granted to the party who *recovers* the judgment. (*Code*, § 309.)

The judgment contemplated by § 309, is a final judgment in the action. It is the judgment or recovery, by which the right of the one party to, the liability of the other to pay, the costs of the action, is determined.

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It is the common practice for the judge at the circuit, on the rendition of the verdict, to make an order for an allowance; but we do not think such an order can be deemed effectual, if the verdict is afterwards set aside, and a new trial granted.

In *Hicks* agt. *Waterman*, (7 *How. Pr. R.* 370,) the plaintiff obtained a report of referees in his favor, and an allowance of a per centage.

The report was afterwards set aside, and a new trial granted on defendant's "paying to the plaintiff the costs of the reference heretofore had." Mr. Justice BARCULO decided that the terms of the order did not entitle the plaintiff to the per centage, and that, on a proper construction of the Code, the defendant could not be required to pay it.

These extra allowances, like those whose amounts are specified in § 307, when made, are, in the language of § 303, granted to the prevailing party "by way of indemnity for his expenses in the action."

In this view of the provisions of the title relating to costs, this court has often refused to allow a per centage when the cause had been over four or five times on the calendar, when one would have been granted if it had been tried at an earlier day after issue joined. Such a practice would be unreasonable, if the extra allowance is made solely or mainly to compensate for the expenses of a trial.

In several classes of cases, enumerated in § 308, an extra allowance may be made, though no trial is had. In the latter cases it is made by way of indemnity for expenses which are neither created nor increased by a trial. In cases in which a trial has been had, it is granted by way of indemnity against the expenses of the proceedings in every stage of the action down to the entry of judgment. We are of the opinion that the plaintiff is not entitled, under the decision granting a new trial, to the \$175 dollars. That when a new trial is granted for causes which, according to the settled practice of the courts, require the condition to be imposed, that the costs of the trial be paid; any extra allowance which may have been granted,

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should not be deemed a part of the costs to be paid, nor payment of them be required.

If these views are correct, the defendants have paid all that they were required to pay, to comply with the conditions on which a new trial was granted.

The motion must be denied.

SUPREME COURT.

DRAPER and others, agt. DAY & ORVIS.

An issue of *fact* formed by the pleadings, in an action to set aside an assignment for the benefit of creditors, for fraud, not requiring the examination of an account, must be tried by the *court*, unless *ordered* (on motion) to be tried by a jury, or referred by consent of parties. It is not a *referable* cause under the Code.

Essex Special Term, July, 1855.

MOTION to refer.

The action is against a judgment-debtor and his assignee, to set aside an assignment for the benefit of his creditors for fraud; and to have the avails of the assigned property applied in payment of the judgment.

On the part of the defendants, it is objected that the court has no power to order a reference in such case, either to hear and determine the cause, or to report the evidence on the facts. But it is insisted that the cause must be tried by the court, unless, on motion, the court order it to be tried by jury.

H. GIBSON, *for plaintiffs.*

MILLARD & KING, *for defendants*

BOCKES, Justice. The distinctions formerly existing between actions at law and suits in equity are abolished; (*Code*, § 69:)

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and, as will be seen by reference to the preamble to the Code, it was intended thereby to establish a uniform course of proceeding in all cases. All statutory provisions, too, inconsistent with the provisions of the Code, are repealed. (*Code*, § 468.) And the former rules and practice of the courts in civil actions, so far as they are inconsistent therewith, are abrogated. (*Code*, § 469.)

The supreme court being vested with law and equity powers, and the old distinctions between actions being abolished, and the former rules and practice of the courts being abrogated, so far as such distinctions, rules and practice were inconsistent with the Code, actions at law and in equity must stand alike, in regard to the mode of disposing of issues by trial. All issues of law must be tried by the court, unless referred by consent of parties, or by order of the court, pursuant to § 271. (*Code*, § 253, 270, 271.) The issue, in this case, is one of fact, and the question is, how is it to be tried?

The Code provides three modes of trial of issues of fact—by jury, by the court, and by referees. Issues of fact which must be tried by a jury, unless a jury trial is waived, or unless referred by consent or order of the court, are such as are raised in actions for the recovery of money only, or for the recovery of specific real or personal property, or for a divorce on the ground of adultery. (*Code*, § 253.)

Every other issue is triable by *the court*, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it, as provided in §§ 270, 271.

This case, not being one which must be tried by a jury, unless a jury trial is waived, or unless referred, the issue therein appropriately belongs to the court to try—and must be tried by the court, unless ordered to be tried by a jury, or referred. The reference is given pursuant to § 270, 271. (*Code*, § 254.) Section 270 provides for references by consent of parties, and of course has no application to this motion.

Then, is this action referable under § 271? Clearly not. The trial will not require the examination of a long account,

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as can be discovered from the moving papers; nor is the taking of an account necessary; nor does the case now present any question of fact other than upon the pleadings. Under the provisions of the Code, therefore, this case, as presented, is not referable.

The plaintiffs' counsel insists, that the cause may be referred under § 77 of the judiciary act of 1847. (*Sess. Laws 1847, chap. 280, pp. 319, 344.*) But in my judgment this section was not intended to embrace the reference of a cause, either for the purpose of determining it by a trial, or to report the facts or evidence, but was intended to apply to interlocutory matters in the progress of the cause—such as computations of interest, and similar services; services which left the merits of the action to be determined by the court on an ordinary and formal trial.

To hold that a reference to take and certify the evidence might be ordered without the consent of parties, would continue one of the evils which our present judicial system was intended to remedy. It is a just requirement, one which our sense of propriety and justice commends, that the evidence in a cause, when practicable, be given in the presence of those who are to adjudicate thereon.

The motion must be denied, and the cause must be tried by the court, in case the parties will not stipulate to refer. Had a motion been made within ten days after the issue was joined, (*Rule 70,*) and *excuse* therefor shown, the issues would have been settled, and an order granted that they be tried by jury.

SUPREME COURT.

SMITH and others agt. ROSENTHALL.

An affidavit of verification, of a complaint on a promissory note, made by an attorney of the plaintiff, stating, in addition to what is required in an affidavit of verification by a party, that he is such attorney, and that he has in his possession the note on which the action is brought, is a sufficient verification.

Monroe Special Term, October, 1855.

MOTION to set aside the judgment in favor of the plaintiffs for irregularity.

C. G. LOEBER, *for defendant.*

J. L. ANGLE, *for plaintiffs.*

T. R. STRONG, Justice. The principal question on this motion is, as to the sufficiency of the affidavit of verification of the complaint. If it is insufficient, the answer of the defendant, although not verified, should have been received, and the judgment entered as upon a default to answer, is irregular, and must be set aside.

The complaint is upon a promissory note, alleged to have been made by the defendant to the plaintiffs, and is wholly upon information and belief. The verification is by the affidavit of one of the attorneys of the plaintiffs, who states, in addition to what is required in an affidavit of verification by a party, that he "has in his possession the promissory note on which the action is brought." That is the whole of the affidavit.

It is insisted, on the part of the defendant, that the affidavit is defective in omitting to state the grounds of the belief of the attorney that the complaint is true, and the reason why it is not made by the party; and the precise points presented are, whether the third clause of § 157, of the Code, is applicable to

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such a case; and if it is, whether it is satisfied by the affidavit in question.

The first clause of § 157 prescribes what the verification must be in substance, and that it must be by the affidavit of the party, &c., if such party be within the county where the attorney resides, and be capable of making the affidavit. By the next clause it is provided, that the affidavit may also be made by the agent or attorney, if the action or defence be founded upon a written instrument for the payment of money only, and such instrument be in possession of the agent or attorney, or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney. The third clause directs, that when the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge or the grounds of his belief on the subject, and the reasons why it is not made by the party.

The true construction of the portion of the section now given, in my opinion, is, that the verification must be by the affidavit of the party, if he be within the county where the attorney resides, and is capable of making it; unless the action or defence is founded on a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney, or unless all the material allegations of the pleading are within the personal knowledge of the agent or attorney; in which cases the verification may be either by the party, when capable, or of his agent or attorney. If the party be not within the county, he may make the affidavit, and in such a case, or when the party is incapable, an agent or attorney may make it, whatever may be the foundation of the action or defence, and whether he has possession of the instrument, when the action is founded on a written instrument, or not, or whether or not the allegations of the pleading are within his personal knowledge. This is not expressly provided for: the section is silent as to the persons by whom the affidavit shall be made, except in the cases specified,—when the party is within the county of the attorney and capable of making it, and when the action is founded upon a written instrument, &c., which is in the pos-

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session of the agent or attorney, or when the agent or attorney has personal knowledge of all the material allegations;—but I think it a fair implication, that in all other cases the party, when he can do so, or any person in his behalf, may make the affidavit. But in every case of a verification by any other person than the party, whether either of those particularly specified in the section or not, the person making the affidavit shall set forth in it his knowledge, when any part of the pleading is stated on knowledge, and the grounds of his belief, when anything is stated upon belief, or generally upon information and belief, of the truth of the matters of the pleading.

In the cases embraced by the second clause of the section, however, when the action or defence is upon a written instrument in possession of the agent or attorney; or all the material allegations are within the personal knowledge of the agent or attorney, the requirement of the third clause is complied with, by stating the fact of possession or of personal knowledge of the truth of the pleading. No further setting forth of the knowledge of the person verifying the pleading, or of reasons why the affidavit is not made by the party, is necessary.

The spirit of the section demands, that the person verifying the pleading should have personal knowledge, or reasonable grounds of belief, that the pleading is true; and an affidavit by a person not having such knowledge or grounds of belief, would be an abuse of the law, which the courts have ample power to correct. It is not enough in any particular case, that the affidavit may be made by another person than the party: the person making it must have knowledge, or a fair basis for his belief, so that the verification will be a substantial and not a mere formal act, and calculated to answer the same purpose as a verification by a party; and his knowledge, or the facts upon which his belief rests, must appear in the affidavit. Added to this, some good reason must be given why the affidavit is not made by the party. But in the cases provided for in the second clause of the section, the legislature have virtually declared, that the possession of the instrument is a sufficient ground of belief of the truth of the pleading, and that personal knowledge

of its truth is sufficient knowledge, and that either such possession, or such knowledge, is a sufficient reason why the verification is not by the party. The affidavit of the party or of the agent or attorney is sufficient in those cases, although the party is within the county of the attorney; the affidavit of the agent or attorney, in such cases, being regarded as equivalent to one by the party. (*Stannard agt. Mattice*, 7 How. Prac. R. 4, 7; *Lefevre agt. Latson*, 5 Sand. Sup. Ct. R. 650, 651.)

I regard it as quite clear, that an affidavit by an agent or attorney, in the ordinary form of a verification by a party, with the addition that the person making it has personal knowledge that the pleading is true, would be sufficient; and I think it not less clear when the action or defence is upon a written instrument for the payment of money only, and the pleading is upon information and belief, that the affidavit would be good, if, in place of that addition, it was stated by the agent or attorney that the instrument was in his possession, and that this was the ground of his belief, and the reason why the party did not make the affidavit. The express statement, that the belief referred to is founded upon the possession of the instrument, and that such possession is the reason why the affidavit is not made by the party, adds no force to the affidavit in the latter case, and may be dispensed with; it is sufficient if the fact of possession is stated; the conclusion will be drawn by the court.

Looking at the section as it stands, and giving to the words their natural import, and full effect to each part of the section, it appears plain to my mind, that my interpretation of it is correct; and this is confirmed by the history of the section which is given in *Lefevre agt. Latson*, above cited.

It follows that the affidavit of verification in the present case is sufficient.

The cases of *Trendwell agt. Fassett*, (10 How. Prac. R. 184,) and *Hubbard agt. The National Protection Insurance Company*, (*ante* 149,) are opposed to this conclusion, but it is supported by the case of *Lefevre agt. Latson*, as I understand it. In *Stannard agt. Mattice*, the question is not considered.

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The papers for this motion are defective, inasmuch as it is not shown that the answer was served within the time allowed for answering, or that a judgment has been entered, but these facts were conceded on the argument that the question discussed might be decided.

The motion must be denied.

SUPREME COURT.

HULSAVER, appellant, agt. WILES, respondent.

Where the proof will warrant it, an officer may grant *an order*, in supplementary proceedings, combining the purposes to be attained by §§ 292, 294, and 296, of the Code.

The officer who grants an order under § 300, is authorized, and may immediately appoint a referee. It is the more convenient practice. (*The case of Hatch agt. Weyburn*, 8 How. Pr. R. 163, holding that the defendant in the order should be brought before the officer in the first instance, has not been generally followed.)

Section 301 provides for an allowance for "witnesses' fees and disbursements, and a fixed sum in addition, not exceeding thirty dollars, *as costs*." Where the officer allowed a fixed sum (\$30) in the order "*for counsel fee*," instead of saying "*as costs*," held, that it was sufficient. The additional allowance must be intended to embrace counsel fee.

When an order speaks the clear intent of the law in regard to the matter to which it relates, it should not be held void, because the precise language of the statute is not employed.

An order in supplementary proceedings, for the examination of the debtor, &c., may be properly granted by an officer at *chambers*. The theory of proceedings supplementary to execution, which are special in their character, is, to afford the creditor a speedy and efficient remedy against a dishonest debtor. And they are to be controlled by the officer before whom they were instituted.

Process in the nature of a *feri facias* (*Sess. L. 1847, p. 390*) cannot be issued to collect the *costs* allowed in an order made in supplementary proceedings; because such an order is not an *order of the court*. A distinction is clearly recognized between orders made by the court, and by a judge or officer out of court.

Montgomery General Term, August, 1855.

THE plaintiff obtained a judgment in this court against the defendant, and issued execution thereon, which was returned unsatisfied. An application was then made to a justice of this court, pursuant to Chap. II, Title IX, Part II, of the Code of Procedure, entitled "Proceedings Supplementary to the Execution;" and an order was granted requiring the defendant and several other persons to appear before a referee, appointed for the purpose, to be examined.

The referee took the examination, and made his report to the officer who granted the order. The counsel for the persons examined under the order, on notice to the plaintiff's attorney, obtained an order from the officer confirming the referee's report, (which was adverse to the plaintiff,) and directing the plaintiff to pay \$30 for counsel fee, and \$4 witnesses' fees. A process in the nature of a *fiery facias* was issued to the sheriff to collect this allowance of \$30.

Thereupon the plaintiff moved to set aside the process, on the ground that it was issued without authority and void.

The motion was heard at special term, and denied. An appeal was then taken to the general term.

S. SAMMONS, *counsel for appellant.*

R. H. CUSHNEY, *counsel for respondent.*

By the court—BOCKES, Justice. The order appointing the referee, and directing the examination of the defendant and other persons, was obtained under §§ 292, 296, (perhaps 294,) the former of which provides for the examination of the judgment-debtor, and the latter for the examination of other persons. There can be no good reason, nor is any reason whatever suggested, against the granting of an order combining the purposes to be attained by §§ 292, 294, and 296. If the proof would authorize it, doubtless the officer could allow such order. The point urged is, that the officer appointed a referee in the first instance, without bringing the defendant, or other persons

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named in the order, before him, and it is therefore claimed that the officer did not obtain jurisdiction.

This argument comes with an ill grace from the party who obtained the order, and acted under it until defeated in his purpose, but who now, to avoid the expense of the proceedings, insists that it was all a farce or trick: still the court must look to its powers and regard the law.

But I have arrived at the conclusion that the order appointing the referee was authorized by § 300. That section empowers the judge, in his discretion, to order a reference to a referee, to report the evidence or the facts. It does not state when he shall make the order; but I have not heard any well grounded suggestion against the convenient practice of appointing the referee in the first instance. There is certainly nothing in the Code to prohibit such practice. If the referee is exceptionable, or if the order is granted improvidently, the party may apply at once to the officer to modify or vacate the order.

The case of *Hatch* agt. *Weyburn*, (8 *How. Prac. Rep.* 163,) is relied on by the appellant's counsel; but that case has not been generally followed, and was expressly repudiated in *Green* agt. *Bullard*. (8 *How. Prac. Rep.* 313.)

The learned judge, in the former case, laid great stress on the fact, that by the amendment of 1851, the words, "or a referee appointed by the judge of the court," were omitted in § 292. Those words were doubtless omitted for the reason that § 300 rendered them quite unnecessary.

In the next place, it is urged that the order on which the process issued was void, because it allowed \$30 *for counsel fee*.

Section 301 authorizes the officer to allow to any party examined, whether a party to the action or not, witnesses' fees and disbursements, and a fixed sum in addition not exceeding thirty dollars, as costs. He allowed a fixed sum, as expressed in the order, "*for counsel fee*," instead of saying "*as costs*." In common parlance, costs include counsel fee. Those terms, as used, are often synonymous. The section plainly contemplates an allowance for the expenses of the party examined, besides his disbursements; and what can it be for, unless to

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cover his necessary expenses in the protection of his legal rights. He is entitled to have the advice of counsel. (*Corning agt. Tooker*, (5 *How. Prac. Rep.* 16.) The additional allowance, I apprehend, must be intended to embrace counsel fee. In granting allowances under § 308, the court generally take into consideration what would be a reasonable counsel fee under the circumstances of the case. (*Sheldon agt. Allertof*, 2 *Sand.* 680.)

There is a wide difference between the meaning of § 301, and the section of the Revised Statutes which provides for the payment of costs in summary proceedings to recover the possession of lands. *Costs* in those cases are deemed to embrace officers' fees only, but § 301 provides for an allowance for "witnesses' fees and disbursements, and a fixed sum in addition, not exceeding thirty dollars, as costs." The allowance, it will be seen, is not limited to costs as heretofore understood, but a sum by way of indemnity to a party for his expenses in the action or proceeding, is contemplated. Those allowances are now termed costs. (*Code*, § 303.) When an order speaks the clear intent of the law, in regard to the matter to which it relates, it should not be held void, because the precise language of the statute is not employed.

It is objected, that the order on which the process issued was granted at chambers, and hence void.

Proceedings supplementary to execution are special in their character, and the theory of them is to afford the creditor a speedy and efficient remedy against a dishonest debtor. Those proceedings are intended to furnish a system of peculiar relief, and they are to be controlled by the officer before whom they are instituted. If the examination is had before the officer issuing the order, he proceeds to dispose of the case at the close of the examination. If a reference is made, an examination is had before the referee, who reports to the officer the evidence or the facts. Still, the proceedings are before the officer, and he takes the case from the referee's report, the same as if he had himself, by an examination, obtained the evidence or determined the facts. His next duty is to grant the appropriate order on the facts before him. There is no statute which re-

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quires any notice of any motion before him for the order, from one party or the other; but good practice suggests the propriety of a notice of the motion from the moving party. (*Todd agt. Crooke*, 4 *Sand.* 694.) And the officer will generally require, (as he did in this case,) that the notice be served. But the system undoubtedly contemplates the granting of the order at chambers: hence, in my judgment, the order in this case was duly granted.

The appellant asserts that there is no authority to issue a process in the nature of a *fiery facias*, to collect an allowance as costs under § 301, and insists that obedience to orders in proceedings supplementary to execution can be enforced only under § 302, which authorizes the officer to punish as for a contempt any disobedience of his order. Section 302 evidently confers on the officer ample power to compel obedience to his orders; and the last clause of the section clothes him with authority to deal justly with a party in case of inability to perform the act required, or to endure punishment.

The process in this case was issued under § 3 of chap. 390, (*Session Laws of 1847*), which provides, that "Process in the nature of a *fiery facias* against personal property, may be issued for the collection of" *costs founded on an order of court*. The costs here alluded to are those mentioned in the section of chap. 390, preceding that above quoted. That section reads thus—"No person shall be imprisoned for the non-payment of *interlocutory costs*, or for contempt of court in not paying *costs*, except attorneys, solicitors," &c. Thus it will be seen that the process may issue for the collection of interlocutory costs, and for costs, the non-payment of which would be deemed a contempt of court. But such process must be *founded on an order of court*. (See § 3, *chap. 390, Sess. Laws, 1847*.)

This process took the place of the precept authorized to be issued by § 15 of *chap. 386, Sess. Laws, 1840*, which permitted the issuing of a precept for the collection of costs awarded on special motions. (*Mitchell agt. Westervelt*, 6 *How. Prac. Rep.* 265.) These statutes of 1840 and 1847 are still in force. (*Mitchell agt. Westervelt, supra, affirmed on appeal; Lucas agt.*

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Johnson, 6 *Howard Prac. Rep.* 121; *Thomas agt. Clark*, 5 *id.* 375.)

The question, then, is, can the order, directing the payment of the \$30 granted by the officer before whom the proceedings supplementary to execution were conducted, be deemed an order of court?

It was supposed by Mr. Justice SANDFORD, that such proceedings must be regarded as proceedings in the cause in which the judgment was rendered. (*Ross agt. Chusman*, 3 *Sand.* 676.) Still they are, to a certain extent, original in their character, as other persons than those named in the judgment-roll may be, and often are, introduced therein as parties. (*Davis agt. Turner*, 4 *How. Pr. R.* 190.)

But this does not divest them of their special character, and they are deemed to fall under the denomination of special proceedings. (*See case last cited.*) They are allowed to be conducted by certain officers, and with the orders made in their progress the court has nothing to do, except to correct them, on motion pursuant to § 324, or review them on appeal. A distinction is clearly recognized between orders made by the court, and by a judge or officer out of court.

It was said by Mr. Justice MASON, in the matter of *Smithurst*, (2 *Sand.* 724, 726,) in speaking of orders granted in a proceeding supplementary to the execution, that "the court, as such, can not punish, because no contempt is shown to its authority, and no power is given to it to punish for contempt of the orders of the judge."

These remarks proceed on the assumption that such orders are not deemed to be orders of the court.

The process must have its foundation on an order of court. (*Sec. 3, chap. 390, Sess. Laws. 1847.*)

In *Lucas agt. Johnson*, (6 *How. Prac. R.* 121, 123,) Mr. Justice WELLES observes, "The order of the court is made the foundation of the execution or process in the nature of a *fieri facias*."

I am, therefore, led to the conclusion, that the order on which the process under consideration issued was not an order of the

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court, and hence that the process is unauthorized by law. Perhaps an order might be obtained from the court at special term, as was done in *Buzard agt. Gross*, (4 *How. Prac. R.* 23,) which would authorize the issuing of a process; but as to that I am not called on here to express any opinion.

The order appealed from must be reversed, but without costs and the process must be set aside.

SUPREME COURT.

WILLIAM S. STOW agt. HUBBARD HAMLIN and others, overseers of the poor, &c.

Where there is no express agreement as to compensation, an *attorney*, in order to recover against his client, must now prove generally what services he has rendered, and what they are reasonably worth.

Implied agreements between attorney and client, stand upon the same footing with the like agreements between other parties.

In the absence of any express agreement, evidence that an attorney has been employed by his client, on an appeal, without showing any value or further services, does not entitle him to any compensation.

Seventh Judicial District, Sept. 1855.

SELDEN, JOHNSON, and T. R. STRONG, *Justices*.

APPEAL from judgment of county court of Wayne county.

The action was commenced in a justice's court to recover the value of services rendered by the plaintiff for the defendants as attorney. The plaintiff, as attorney, had tried several suits for the defendants in justices' courts, which services had all been settled and paid for at the price stipulated, except \$5 for one suit. Several of these judgments had been appealed from to the county court, and the plaintiff proved, on the trial before the justice, that he was employed to take charge of the appeals in that court; but did not prove that his services were of any value, or that he had rendered any services under such employment. The suits were settled by the parties after the appeals.

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The justice allowed the plaintiff nothing in the appeals, and gave him judgment for the \$5 only. The county court reversed the judgment of the justice, on the ground that the plaintiff was entitled to recover something for his retainer in the suits appealed; and that it was the duty of the justice to fix and determine the value, in the absence of all proof on the subject of value.

W. S. STOW, *in person*.

H. V. HOWLAND, *for defendants*.

By the court—JOHNSON, Justice. The plaintiff recovered before the justice for all the services proved to have been actually rendered and not paid for.

The only question therefore is, whether he was entitled to recover anything upon proof merely, that he was retained in the suits appealed to the county court, without proof of any agreement in regard to compensation, or any services in fact rendered. The fee-bill is abolished, and the measure of the compensation of an attorney or counsel is to be governed by the express or implied agreement between him and his client. Implied agreements between attorney and client stand upon the same footing with the like agreements between other parties.

Evidence that a person was employed to render service, does not prove that the service stipulated for has been rendered. The party claiming compensation must go further, and show the extent of his performance and its value. The law will not presume, from mere proof of the undertaking, that the party has performed any valuable service under it. It is urged by the plaintiff, that in the absence of an express agreement, the court or jury should allow to the attorney what the statute gives to a party as his compensation. But no such agreement can be implied in behalf of an attorney or counsellor. The statute gives certain sums to the prevailing party only, for his compensation; and if such were the rule, the attorney of a defeated party could recover nothing on an implied agreement. Where there is no express agreement as to compensation, the

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attorney, in order to recover against his client, must now prove generally what services he has rendered, and what they are reasonably worth.

Judgment of the county court reversed, and that of justices' affirmed.

SUPREME COURT.

REUBEN W. HAWES agt. ANTHONY C. HOYT.

Although it is said that the Code is a nursing mother, and amends or overlooks formal irregularities, it does so only "in furtherance of justice."

A defendant who has not *pleaded* in time, ought not to be allowed to say to the plaintiff, you have not *sued* me in time. In other words, to be allowed as matter of grace to *his laches*, to interpose the *statute of limitations* to the plaintiff's demand, embraced in a regular judgment, by default.

New-York Special Term, Dec., 1853.

MOTION by defendant to set aside judgment and subsequent proceedings, and for permission to defend, &c.

— — — — *for motion.*

— — — — *opposed.*

ROOSEVELT, Justice. It appears to me very clear, that the debt on which this action was brought is justly due. It arose out of a sale of goods made directly by the plaintiff to the defendant, and promissory notes given thereon directly by the defendant to the plaintiff. Copies of the notes are set forth in the complaint; and although the defendant swears "he has no *knowledge* of the making of said notes," it is obvious that his ignorance, if it be genuine, is quite voluntary, and that he has no particular desire to be enlightened. His belief, although in such a case admissible, and even necessary, he is careful to withhold. The conclusion is irresistible, that the notes are

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genuine—and there is no suggestion that they have ever been paid.

The defendant, however, insists further, that, if due, they are barred by lapse of time; and he has put in, he says, an answer to that effect, against which two objections are raised. First, it came too late. The attorney, it is true, swears he mailed it in season; but the post-mark and the post-master show, I think, that he is mistaken. Secondly, the answer is entitled in another cause. Robert and Reuben are totally different names. It is not a case of the same sounds differently spelt—such as Robert with two b's or two t's but Robert, a well-known name, instead of Reuben, a name equally well known, but altogether different.

The Code, it is said, is a nursing mother, and amends or overlooks such formal irregularities.

It does so, but only “in furtherance of justice.” Would justice be furthered by allowing a plea of the statute of limitations in such a case, by permitting a party, who has not *pleaded* in time, to say to his adversary, you have not *sued me* in time? Can the defendant, as matter of grace, ask indulgence to *his* laches, merely to enable him to deny the like indulgence to the laches of his adversary? The courts, in such cases, have properly enforced a sort of set-off, neutralizing the default of the one by the default of the other, and refusing to waive the negligence of the defendant, unless on his part he would stipulate to waive that of the plaintiff.

Being satisfied, therefore, of the undoubted justice of the plaintiff's debt, and of the regularity of the judgment entered upon it, I must deny the defendant's motion to vacate the proceeding; with liberty, however, to take a reference, should he be so advised, at his own expense, to inquire into the genuineness of the notes, and whether any payments have been made upon them; and, on the coming in of the report of the referee, to make such motion as he may deem proper.

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SUPREME COURT.

MERRITT agt. BAKER.

Judgments by confession, drawn up by the plaintiff, when the defendant has no adviser, must be carefully watched by the court, that they be not used to oppress unwary defendants.

Whether *affidavits* in reference to the *credibility* of a party, can be received on a motion is *questionable*. If ever received, it should be with an opportunity to produce counter-affidavits.

The execution in this case was issued against the defendant immediately after the confession of judgment. The defendant said the plaintiff was to give him a written stipulation to wait three years before issuing it. The plaintiff denied this. *Held*, that the evidence was overwhelming in favor of the defendant. Execution set aside, with \$10 costs.

New-York Special Term, Sept., 1854.

MOTION to set aside execution for irregularity.

— — — — — *for motion.*

— — — — — *opposed.*

MITCHELL, Justice. On the 2d of August, instant, the defendant confessed judgment to the plaintiff for about \$800, and on the next day, the plaintiff issued execution, and levied on the defendant's goods. The defendant moves to set aside the execution, alleging that the judgment was confessed on a stipulation that execution should be stayed for three years, if the interest should be paid. This agreement the plaintiff denies. About \$600 of the debt was secured by a mortgage, which was under foreclosure, and as to which there was a controversy, and the cause was at issue—not yet reached on the calendar. The rest of the debt was principally for rent due. The defendant thus had the means of delaying the plaintiff as to three-fourths of the debt. Some motive must have been presented to him to abandon this advantage, and confess a litigated claim to the plaintiff.

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The plaintiff states none, and would make out that, at his request, and without any benefit to the defendant, the defendant, as soon as called on, agreed to confess judgment for the disputed mortgage debt, and the unliquidated demand for rent. This is hardly credible, while the defendant's statement is altogether probable, and according to the common course of such transactions.

The defendant also states all the particulars of the manner in which the plaintiff made the promise; of his repeating it at the commissioner's office; of his excuse for not complying with it—(because it was late)—when leaving that office; of the defendant calling on him again at his house on the same evening, and the repetition there of the promise that the stipulation should be given the next day punctually at 9 A. M.; of the defendant's attendance punctually at that time, and the plaintiff's omission then to attend; of the defendant's calling at the office of the plaintiff's attorney, to find the plaintiff and get the stipulation; and of his return there some few hours afterwards, when, to his surprise, he had found that the sheriff had levied on his goods, and his prompt appeal to the plaintiff's counsel to go to the plaintiff and get the matter righted—no *one particular* of which is denied. The plaintiff contenting himself with the general denial, that he ever agreed to stipulate to wait three years. This also makes the plaintiff's statement less reliable. The declarations of the defendant, as to the agreement, made promptly to the plaintiff's counsel, and within less than thirty-six hours after the agreement was made, (although not such evidence as would be admissible before a jury,) are entitled to weight where the parties themselves are witnesses, and the *court* is to judge of the whole matter.

Judgments by confession, drawn up by the plaintiff, when the defendant has no adviser, must be carefully watched by the court, that they be not used to oppress unwary defendants.

The judgment, as well as the execution, may be set aside, if the plaintiff so elects: at all events, the execution must be set aside, with \$10 costs, and the plaintiff to pay the sheriff's fees;

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and if the plaintiff wishes the judgment to stand, he must execute a stipulation, such as is stated in the defendant's affidavit.

On the application of the plaintiff, the motion has been reheard on papers submitted. Those papers make little change in the aspect of the case as before presented, except in relation to the credibility of the defendant. Whether such affidavits are ever to be received on a motion is questionable. If ever received, it should be with an opportunity to the party to produce counter-affidavits. That is done in this case, and the preponderance is overwhelming in favor of the defendant.

The defendant's statement is also confirmed by the affidavit of Mr. York, his counsel, who shows that Baker advised with him before judgment was confessed, and then told him that the plaintiff agreed to suspend execution for three years.

There is no reason for changing the opinion before expressed, and an order may be entered pursuant to it.

SUPREME COURT.

CHARLES WEBER and others agt. JOHN FOWLER, &c

Where notice of *lis pendens* was filed and indexed in the county clerk's office, giving the name of one of the parties in the title of the cause "John F. Fowler," instead of *John Fowler*, the true name, *held*, that the index was sufficient to put a purchaser *pendente lite* on inquiry, and to charge him with all the knowledge to which that inquiry, if made, would have led.

Where it appeared by the decree that the plaintiffs were entitled to a lease of the premises described in the notice of *lis pendens*, from the original owner, the execution of which would have been charged upon the purchaser *pendente lite*,

Held, that the plaintiffs having elected to take, by the decree, instead of a *specific performance*, operating on the estate itself, a *substituted equivalent in money*, decreed to be paid to them by the original owner personally, they could not, on an allegation of the original owner's subsequent insolvency, turn

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round and ask the court to make a different decree, charging the purchaser *pendente lite*; especially as the latter, although negligent, had no actual notice of the suit.

New-York Special Term, 1854.

APPLICATION by petition to compel the purchaser of premises *pendente lite*, to perform a decree made against the original owner.

— — — — — *for motion.*

— — — — — *opposed.*

ROOSEVELT, Justice. Prior to the statutory provision, contained in the Revised Statutes, (2 R. S. 174, § 76,) on the subject of purchases of real estate during the pendency of suits, it was the established rule of courts of equity, that such purchasers, whether notified or not, took their titles subject to the result of the litigation. The rule, although seemingly necessary to give effect to chancery decrees and to obviate the inconvenience of a constant change of parties, at times worked great injustice to innocent persons, and induced at last the interference of the legislature.

By the act of 1823, incorporated in the Revised Statutes, it was provided that, to render the filing of a bill in chancery constructive notice to a purchaser of real estate, it should be the duty of the complainant therein to file at the same time, with the *clerk of the county*, a notice of the pendency of the suit, and the duty of the clerk to make and keep in his office an index, "with such references to the said notices as will enable all persons interested to search his office for such notices without inconvenience." Among other requisites, the notice must "set forth the *tit'e* of the cause."

It is not disputed that a notice was filed in the present case. In naming the parties, however, in the title of the cause, it designated the defendant Fowler by the name of John F. Fowler, instead of John Fowler; and the question is, whether, notwithstanding this error in a single letter of a single name, there

was or was not a sufficient "setting forth of the title of the cause," to satisfy the requirements of the law.

The purchaser, Osborne, admits that he caused the title of the property to be examined by counsel before paying his money; and he alleges that he had "no knowledge or information" of the pendency of any suit in regard to it. The law, however, presumes, and such probably was the fact, that either he or his agent, in examining the index in the clerk's office, saw a reference to a suit pending against John F. Fowler. Was not this a circumstance sufficient to put a person of ordinary caution on inquiry?" Slight mistakes in the spelling of names are, and are well known to be, of daily and hourly occurrence. And it is also a well-settled and well-known rule of law, that middle letters, like "junior" additions, although descriptive, are not essential parts of a name. (*The People* agt. *Collins*, 7 *Johns. R.* 549; *Franklin* agt. *Tallmadge*, 5 *J. R.* 84; *Roosevelt* agt. *Gardinier*, 2 *Cow.* 463; *Milk* agt. *Christie*, 1 *Hill*, 102. As a prudent man, then, seeing by the index that there was a suit pending against John F. Fowler, was he not bound for greater certainty to put himself to the very slight additional trouble of looking at the notice itself? Had he done so, he would have found that the suit related to the identical property about which he was negotiating; that the plaintiff was endeavoring to get redress for a gross breach of trust in regard to it, and that, in the end, he, the purchaser, might have to stand in Fowler's shoes, and respond to the judgment obtained against the wrongdoer. Thus admonished, then, he either did or did not inquire. If he did, he had actual notice, and cannot claim to be a *bona fide* purchaser in fact: if he did not, he was guilty of gross negligence, and should take its consequences patiently, and not attempt to place them on the shoulders of the injured party.

It should be borne in mind, that the statute of *lis pendens* is not the original grant of a right with a condition precedent attached, but a remedial provision in favor of purchasers, derogating from the existing common-law rights of suitors in chancery. To avail himself of it, therefore, the purchaser should show at least ordinary diligence. *Vigilantibus non dormientibus*

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is the maxim of the law. No man is allowed, in spite of warning, to shut his eyes and then claim the privileges of want of sight. He who can see, and wont see, although he cannot legally, perhaps, be made to see, must take the consequences, and be chargeable precisely in the same manner as if he had seen.

The notice in the present case, or rather the index referring to it, it appears to me, was abundantly sufficient to put the purchaser on inquiry, and to charge him with all the knowledge to which that inquiry, if entered upon, would have led. He holds his title, therefore, subject to the decree; and had that decree directed Fowler, whether by the name of John or John F., to give the plaintiffs the lease to which they were, and were adjudged to be, clearly entitled, of the premises described in the notice, Osborne, the purchaser pending the suit, must have been required to do it for him, or to ratify the act, if done by Fowler.

But what was the decree which the plaintiffs, to effectuate the rights established and declared by the court in their favor, elected to take? Instead of a specific performance, operating on the estate itself, they accepted, and, for aught that appears, prayed for, a substituted equivalent in money. And the decree accordingly, having first provided for ascertaining the value of a term, such as that to which the plaintiffs were adjudged to be entitled, "ordered and decreed, that the said John Fowler pay the same to the plaintiffs."

Can the plaintiffs, on the allegation of Fowler's subsequent insolvency, now turn round and ask the court, in effect, to make another and different decree? It seems to me, especially as against a purchaser who has paid his money, and who, although negligent, had no actual notice of the suit, they cannot. The election they have made precludes them. It is an issue, as the case appears before me, between two innocent parties, and the rule, *potior conditio defendentis*, applies. As, however, other facts and views may perhaps be developed on a more thorough and formal investigation, I shall deny the present application by petition, with a reservation to the plaintiffs of the right to

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file a *bill* or *complaint* to carry the decree into execution, making Osborne and such other persons parties as they shall be advised.

Prayer of petition denied, without prejudice and without costs.

NEW-YORK COMMON PLEAS.

FIGANIERE agt. JACKSON.

In the marine court of New-York, the justice before whom a trial is had, with or without a jury, must, in every case, *give judgment*; and the clerk must docket the judgment, in conformity with the entry, or minute made by the justice.

And the party *appeals* from such judgment, to the general term of the marine court, as he would appeal from a judgment entered by direction of a single justice of the supreme court. The mode of procedure in both cases is the same.

And the general term of the marine court has all the powers, in reviewing the judgment, which the general term of the supreme court would have in such cases. (*See The People ex rel. Figaniere agt. Justices Marine Court, ante page 400.*)

Where the general term of the marine court ordered a new trial, unless the plaintiff should elect to reduce the amount of the judgment, which the plaintiff refused to do; and under a subsequent order of a justice of that court, the plaintiff was required to make such election, in writing, within three days, or that his *complaint be dismissed*, which, on plaintiff's refusal, was done.

Held, that the justice could not do that—he had no authority to dismiss the complaint. The proper way was, to have set the cause down *for trial*, in case the plaintiff did not elect to reduce the judgment.

General Term, November, 1855.

— — — — *for motion.*
 — — — — *opposed.*

By the court—DALY, Judge. This is an application to vacate the transcript of a judgment entered up in the marine court.

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The cause was tried in the court below, before a single justice and a jury; and a verdict having been found for the plaintiff, judgment was entered up by the justice, in manner and form as prescribed by the statute. (1 *Rev. Laws of 1813*, p. 386, § 123.) From this judgment the defendant appealed to the general term of the marine court, and the general term ordered a new trial, unless the plaintiff should elect to reduce the amount of the judgment. This the plaintiff refused to do. Whereupon one of the justices made an order that the plaintiff make the election, in writing, under the order of the general term, and serve notice thereof upon the defendant within three days after service of notice of the order, which the plaintiff having omitted to do, his complaint was dismissed.

It is insisted that no appeal lay to the general term in the case, and that the order made by it, granting a new trial, with the proceedings subsequent thereto, were void, and that the judgment still remains in full force and effect.

It is claimed that the general term have no power under the act of 1853 (*Laws of 1853*, p. 165,) to review anything but the decision of a single justice opening a default; but it has been repeatedly held upon motions in this court that such is not the construction of the statute—but that an appeal lies from any judgment rendered by a single justice. An appeal lies, in the language of the statute, from a judgment entered upon the direction of a single justice, “to the general term,” in the same manner, and with the like effect, as appeals in the supreme court from a decision by a single judge “to the general term.”

The meaning of this is very plain. In the supreme court a judgment may be entered upon the decision of a single justice, without a jury, from which an appeal lies directly to the general term, (§ 348,) and when the trial is by a jury, the clerk enters the judgment in conformity with the verdict, unless a different direction is given by the court. (§ 264.) But the statutes organizing the marine court give the clerk no power to enter judgment in conformity with the verdict of the jury. He is authorized to docket or register judgment, but the court must

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give judgment. (2 *Rev. Laws*, p. 383, § 110, pp. 387, 123.) The justice before whom the trial is had, with or without a jury, must, in every case, give judgment, and the clerk must docket the judgment in conformity with the entry or minute made by the justice. As every judgment in the marine court is entered upon the direction of the justice who tries the cause, the provision of the statute of 1853, that appeals are to be brought in the same manner, and with the like effect as appeals in the supreme court from the decision of a single justice to the general term, is plain or obvious.

The party appeals from the judgment entered by direction of the justice of the marine court as he would appeal from a judgment entered by direction of a single justice of the supreme court. The mode of procedure in both cases is the same, and as an appeal in the marine court is to have the like effect, the general term of that court has all the powers in reviewing the judgment which the general term of the supreme court would have in the case pointed out. They may order a new trial, or, as respects the appeal and in every stage of it, do whatever the supreme court might do in any case of an appeal from the decision of a single judge of the court to the general term.

The order of the general term was defective in not pointing out within what time the plaintiff should elect. But no time having been named, it was competent, as it would have been in the supreme court, for a single justice to make an order that the plaintiff should elect within a reasonable time, and if he failed to do so, to order that the cause be set down for trial, when, if the plaintiff failed to appear and prosecute the case, judgment of default might have been rendered against him. This, it appears, was not done, but the justice dismissed the complaint upon the plaintiff's refusing to elect. This he had no authority to do. The extent of the decision of the general term was to order a new trial if the plaintiff would not consent to reduce the amount of the judgment. The general term did not order that the complaint should be dismissed if the plaintiff failed to elect whether he would have a new trial or reduce the judgment; but that the judgment should be reversed, if he did

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not consent to reduce it to \$250, and a new trial ordered. Under that decision, though the plaintiff refused to elect, he was still entitled to have the cause tried over again; of which, it appears, he was deprived by the justice dismissing his complaint, because he refused to elect whether or not he would reduce the amount of the judgment. This, however, does not affect this motion. The cause is yet pending and undetermined, and this motion vacating the transcript of the judgment must be granted.

SUPREME COURT.

ISAAC M. WRIGHT agt. JOSEPH DELAFIELD and others.

In all cases, where a single judge, before whom a cause has been heard, has deliberately pronounced his decision, he has no power to suspend the formal entry and docketing of the *judgment*, consequent upon such decision, or to deprive the successful party of the benefit, which by the terms of the law the docket gives him.

Where an appeal is desired, and the requisite security to stay execution has been given, the court may, on proper terms, direct an entry on the docket that the judgment is "secured on appeal;" and thereupon the lien ceases, and the judgment-debtor is left free to mortgage or dispose of his property till the final determination of the case. (§ 281.)

And although the *lien* cannot be prevented without security, a *stay of execution* may be obtained, either by such security or by the special order of the judge dispensing with it entirely, or upon terms, in his discretion. (§ 349.)

In *jury trials*, but in no other cases, a judge is authorized (§ 265) to direct "the judgment in the mean time to be suspended," or a verdict to be taken "subject to the opinion of the court at a general term." And then "the application for judgment must be made at the general term." (*See Taylor agt. Harlow & Pierson, ante page 285.*)

A plaintiff has no right to compel the defendants to *elect* between the suit in which he is plaintiff, and another suit in which the defendants are plaintiffs against him in reference to the same subject matter. If it is a double vexation, he is chargeable with it as much as the defendants. It is not a case of election.

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New-York Special Term, 1854.

APPLICATION by plaintiff for a stay of proceedings, &c.

— — — — — *for motion,*
— — — — — *opposed.*

ROOSEVELT, Justice. This cause was brought to trial before a single judge, without a jury. A decision, as required by the Code, was given, in writing, in favor of the plaintiff, so far as it directed a conveyance of the land to *him*, and against the plaintiff so far as it directed payment of the purchase money *to the defendants*. From this decision he wishes to appeal to the general term, and to prevent in the meantime the entry of a judgment, until the appeal shall be disposed of.

Section 267 of the Code contemplates no such suspension. After providing for the time and manner in which "the decision," on a trial by the court, shall be given, it declares, without specifying or implying any delay or qualification, that "judgment upon the decision shall—(that is, on the instant)—be entered accordingly." Besides, no appeal can be taken from a mere "decision." The chapter providing for appeals "from a single judge to the general term,"—and it is only that chapter which authorizes any appeal—declares that such appeals may be taken "from a *judgment entered* upon the direction of a single judge." (§ 348.)

The *entry* of the judgment, therefore, so far from precluding, is essential to an appeal. And further, to lay a proper foundation for the appeal, "either party," says the Code, (§ 268,) "may except to a decision, &c., within ten days after notice, in writing, (not of the decision, but) of the *judgment*;" and, with the same view, either party may call upon the judge, *who* tried the cause, to give a statement, "briefly specifying the facts found by him, and his conclusions of law."

Upon filing the judgment-roll it may be docketed; and *when* docketed it becomes a lien; and as the roll is to be filed "*immediately after entering the judgment*," the lien attaches, *in*

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effect, immediately after such entry, and of course before the appeal can be disposed of, or even taken.

The framers of the Code, anticipating this possible evil, have provided, that where the requisite security to stay execution has been given, the court may, on proper terms, direct an entry on the docket, that the judgment is "secured on appeal," and thereupon the lien ceases, and the judgment-debtor is left free to mortgage or dispose of his property till the final determination of the case. (§ 281.)

And although the *lien* cannot be prevented without security, a stay of execution may be obtained, either by such security, or by the special order of the judge dispensing with it, if in his opinion such dispensation be just, or prescribing such other terms as he may deem proper. (§ 348.)

The counsel for the plaintiff seems to suppose that the single judge, without entering the judgment, and without a formal appeal, may order the exceptions to be heard at the general term. That practice is entirely confined to jury trials, where the judge is generally compelled to decide in haste, and without much opportunity for examination and reflection. In those cases, but in no others, he is authorized, by § 265, to direct "the judgment in the meantime to be suspended," or a verdict to be taken, "subject to the opinion of the court at a general term." And then "the application for judgment must be made at the general term."

Thus it will be seen that in all cases where the single judge, before whom the cause has been heard, has had, or is presumed to have had, ample time for discussion and consideration, and has deliberately pronounced his decision, which he at least should assume to be right, he has no power to suspend the formal entry and docketing of the judgment consequent upon such decision, or to deprive the successful party of the benefit which, by the terms of the law, the docket gives him.

The order staying proceedings must therefore be discharged.

An application is also made by the plaintiff, Wright, to compel the defendants to elect between this suit, in which he is

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plaintiff against them, and the other suits, in which they are plaintiffs against him.

Their answer to it is—and it seems to me conclusive—that they *do* elect to go on with *their* suits, and that *he* elects to go on with *his*; that they elect to make their own defence to his suit, and he elects to make his own defence to theirs. They control the litigation in the form of actions *on* the notes, and he in the form of an action *against* the notes. Why should they elect rather than he? If it be double vexation—which I admit the law does not allow—the charge lies as much at his door as at theirs. It is not a case of election. The plaintiff, however, may take an order, if he sees fit, allowing him to pay the principal, interest, and costs, in the actions on the notes, without prejudice to his rights, as they may finally be determined on the appeal in this action.

SUPREME COURT.

WILLIAM J. FINLAY agt. THE AMERICAN EXCHANGE BANK.

BLISS & HUBBARD agt. THE SAME.

WORTHINGTON agt. THE SAME and others.

WILLETS, President of the American Exchange Bank, agt.
FINLAY and others.

The Commercial Bank of Toledo, Ohio, on the 27th Nov., 1854, suspended payment, and gave notice thereof on the same day to the American Exchange Bank, New-York. It had a balance to its credit in the latter bank, on that day, of over \$4,000; which grew out of the business relations between them, as exchange banks, for several years previous—each paid interest on the balances against it, and each paid as drawn for.

Held, that the drawing of sight drafts, or checks, of the Commercial Bank of Toledo, in favor of the plaintiffs, did not operate in law, any assignment to

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the holders, either legal or equitable, of any funds in the hands of the American Exchange Bank.

The presentation of such paper to the American Exchange Bank, after it had received notice of the suspension of the Commercial Bank, imposed no obligation upon the former bank to pay the paper, as between that bank and the holders. It was not *liable* to the plaintiff or the holders of the paper.

To enable the court to take jurisdiction in an interpleader suit for a particular fund, so as to settle the equities between all the parties, the amount of the fund must be ascertained with sufficient certainty to enable it to be brought into court; unless the parties can agree to fix the amount.

Where there is a fund due to an insolvent bank, and the holder, a bank, brings an interpleader suit against the respective claimants, the proper *parties* to such suit are, the *receiver* of the insolvent bank, the *attaching creditors*, and the *sheriff* who has attached for them; but not the *bill-holders* or *check-holders* of such bank; because the latter have no *lien* upon the fund, either as assignees in equity or otherwise.

In the sense of an *implied agreement* between the drawer of a check and the holder, that the drawer will not withdraw his funds, but leave them in the banker's hands to meet the check, the drawing of the check is to be regarded as an *appropriation* of the funds, but in no other sense.

And this operates no *assignment* of such moneys, nor an appropriation of them in fact, in the sense which would give the holder a *lien*, either legal or equitable upon the fund.

Where the fund goes to the receiver in another state, the bill-holders will be retained as parties; and after it has been adjudged which of the interpleading parties is entitled to priority, the bill-holders may ask that their several claims be paid out of the fund as against the receiver, and before the receiver shall take the fund from the court.

New-York Special Term, July, 1855.

THE first three suits were brought against the American Exchange Bank for payment of sight drafts, or bank checks, of the Commercial Bank of Toledo, Ohio, which the respective plaintiffs held.

The last suit was brought by the American Exchange Bank, against the several plaintiffs as an interpleader suit.

The following facts were found by the court, viz.:—

The plaintiffs held the paper which is set forth in their respective complaints, and it was presented to the American Exchange Bank for payment, at the time and in the manner averred in said complaints respectively: payment was refused, for which these suits were brought.

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At the time of presentation, the American Exchange Bank had an account with the Commercial Bank of Toledo, and had in its hands, of the Toledo bank funds, about \$10,800. The Toledo bank held, also for collection, about \$14,000 of paper, part of which belonged to the American Exchange Bank, and a part to its customers, which had been remitted by the American Exchange Bank to the Toledo bank for collection.

On the 27th of November, 1854, the Toledo bank suspended payment, and the American Exchange Bank received a friendly notice of such suspension the same day, by telegraph. After such notice, it refused to pay the Toledo bank drafts, including those in question. A subsequent balance struck by the American Exchange Bank, in March, 1855, showed that the American Exchange Bank, upon adjustment of balances as the accounts stood on the 27th of November, 1854, was indebted to the Toledo bank in over \$4,000.

This balance grew out of the business relations between the two banks, which had existed for several years prior to the 27th of November, 1854, by which the American Exchange Bank became agent of the Toledo bank, to collect its eastern paper, and the Toledo bank became agent of the American Exchange bank, to collect its western paper. Each one also further acting for the other, as in the regular course of their business was required.

The practice was, for each to collect, and carry the collections to the credit of the other, and to pay as drawn for. The American Exchange Bank paid four per cent. interest on balances due by it to the Toledo bank, and charged the current-rate, not exceeding seven per cent., on balances due from the Toledo bank to the American Exchange Bank.

These suits were all commenced within a few weeks after the dishonor of the paper.

The above are the facts as found by the court.

The following is held to be the law, as applicable to the facts, viz.:—

First. The drawing of the paper in favor of the plaintiffs did not operate, in law, any assignment to the holders, either legal

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or equitable, of any funds in the hands of the American Exchange Bank.

Second. The presentation of such paper to the American Exchange Bank imposed no obligation upon such bank to pay the paper, as between the bank and the holders.

Third. The American Exchange Bank is not liable to the plaintiffs by reason of any of the facts above set forth.

Fourth. The several actions above named are to be dismissed, but without costs to either party.

— — — — — *for motion.*

— — — — — *opposed.*

COWLES, Justice. This bill has not all the essential features of a bill of interpleader; for the amount of the fund is not ascertained with sufficient certainty to enable it now to be brought into court, and allow the plaintiff to be discharged from the further proceedings in the suit.

But with the understanding which was entered into in that respect on the trial, the amount of the fund can be hereafter settled; and the bill is thus so far in the nature of an interpleader suit that the court can take jurisdiction of the case, and settle the equities between all of the parties.

The parties will, if they can agree, fix upon the amount of the fund; if not, a balance must be struck, under the order of the court, to be hereafter made; and the balance so struck will be regarded as the fund subject to the decree, and to be disposed of by it.

The next question is, who are proper parties to interplead for this fund?

The receivers, as respecting the Toledo bank, are clearly proper parties; because in the event of there being no other claimants, they are entitled to the whole.

The attaching creditors, and the sheriff who has attached for them, are also proper parties; for by their attachment they have acquired a right to, and interest in those funds, unless some party has a superior and better right.

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They are, therefore, to be decreed to interplead for this fund.

The other parties, the bill-holders, or, as they term themselves, the check-holders, also claim to have a lien upon this fund, as assignees in equity of the same, under and by virtue of their checks.

It has often been said by the elementary writers, and the same language is used by judges in many of the reported cases, that a bank check is an appropriation by the drawer of so much of his funds in the hands of his banker as is necessary to pay the check, and that there it should remain until the check is paid. (*Cruger agt. Armstrong*, 3 *John. R.* 5; 3 *Kent's Com.* 104, n., 7th ed.; *Domic agt. Kyle*, 1 *Kelly*, 304; *Matter of Brown*, 2 *Story's Rep.* 502; *Story on Prom. Notes*, § 489; *Bayles on Bills*, 3d *Am. ed.* 79, note.)

But I have looked in vain through the books for a single case where, in a suit by the holder against the drawee, it has been held that the holder had a right of action against the drawee for non-payment of the check; nor can I find any adjudication which leads to the inference, that the appropriation of funds so spoken of raises anything like privity of contract between the holder and drawee.

The theory, as respects a check, undoubtedly is, and such should be the fact, that it is drawn on a banker, against a fund of the drawer actually in the banker's hands, and which the banker is supposed to stand ready to pay on presentation of the check. When that is the case, the drawer, by the mere act of drawing the check, if he is honest, does devote so much of his funds in the hands of his banker to the holder, and cannot, without a breach of good faith, withdraw them.

The authorities hold that his contract with the holder is, that the banker will pay on presentation, and if he does not, then the drawer himself will.

In the sense of an implied agreement between the drawer and holder, that the drawer will not withdraw his funds, but leave them in the banker's hands to meet the check, I readily subscribe to the doctrine, that the drawing of the check is to be

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regarded as an appropriation of the funds; but in no other sense than that.

Yet this operates no *assignment* of such moneys, nor an appropriation of them in fact, in the sense which would give the holder a *lien*, either legal or equitable, upon the fund—certainly not so as to bind the banker. And with reason and on principle, because, in the first place, there is no privity of contract between the holder and drawee, whatever there may be between drawer and drawee. In the next place, the drawer may stop the payment of his check, and the banker is bound by the countermand, which could not be the case if the check operated an assignment in favor of the holder, and became binding on the drawee. (*Dyckers' agt. Leather Manufacturers' Bank*, 11 *Paige*, 616.)

In *Bayles on Bills*, 3d Am. ed., p. 32, note, it is said:

"In *Fry and Chapman's Bankruptcy*, in the year 1829, several holders of checks on the bankrupts claimed to prove, alleging that they were equitable assignees of choses in action. *The commissioners took time to consider, and afterwards disallowed the claim;*" and this is the only authority cited in support of the text, which says, *it is said* that the holder of an unpaid check, as assignee of a chose in action, has an equitable claim upon the drawee, and, in the event of the bankruptcy, may prove under the fiat.

Neither in that work nor in *Story on Promissory Notes*, both of which treat at some length of checks, as contradistinguished from bills of exchange, is anything to be found which, as an adjudication, supports the doctrine that, as between holder and drawee, the check is an equitable assignment of the funds in the drawee's hands.

In *Bellamy agt. Magoribanks*, (8 *Eng. Law & Eq.*, 517,) the attorney-general argued: "The banker owes no duty to the holder, and is liable to no action at his suit, if the check is not honored;" and PARKER B., in the same case, reiterates the same doctrine.

These, although mere *dicta*, show what was supposed to be the well-understood rule on that subject in England.

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In *Bullard* agt. *Randall*, (1 *Gray's Rep.* 605,) the supreme court of Massachusetts held, directly, that a check did not operate an assignment of the funds in the hands of the banker; but the ground on which it is placed, viz., that it was drawn only for a part, but not for the whole of the drawer's funds, is not very satisfactory, and is certainly at variance with the exceptions to such a rule in certain cases, as laid down in 5 *Whit.* 577. But in this state the rule seems to be settled. (*Dyckman* agt. *Leather Manufacturers' Bank*, 11 *Paige*, 612; *Chapman* agt. *White*, 2 *Seld.* 412.)

In this last case, the depositary had funds of the drawer, more than sufficient to pay the check, but, as in the case at bar, had the right to, and probably had, used them in the regular course of business, and paid interest for their use, as was also done in this case.

In the case last cited, *GARDINER, J.*, held, that the money became the property of the depositary, and that the depositor had a mere right of action for the money; that the draft did not operate an assignment in favor of the holder.

The facts in that case are very analogous to the case at bar. In both cases the depositary had moneys on which interest was paid. In both cases value was paid for the drafts, and the drafts were protested and dishonored. The paper in both cases is identical in phraseology; in both cases was drawn on a bank, and payable on presentation. No rule can be well conceived which, under the facts, would not equally apply to both cases; and the rule as laid down in that case is decisive of this.

I have thus far treated this as a case of bank checks, as contradistinguished from bills of exchange, as I still think it is, notwithstanding that *GARDINER, J.*, in *Chapman* agt. *White*, called the paper in that case a bill of exchange.

If, however, these drafts are to be treated as bills of exchange, and subject to the rules which govern that class of paper, then the authority is abundant that a bill of exchange does not operate an assignment of the funds in the drawee's hands

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in favor of the holder. (*Luff agt. Pope, 5 Hill, 413; Cowperthwaite agt. Sheffield, id. 243, and the cases there cited.*)

On no ground can I discover authority for holding that these drafts operated any assignment of the funds in the hands of the holders; and if not, then much less could it be claimed that the non-payment on presentation gave the holders a personal claim on the American Exchange Bank.

I have failed to allude to another ground on which, as it seems to me, the American Exchange Bank were excused from paying. They (The American Exchange Bank) had notice of the stoppage of the Toledo bank; they held funds of the Toledo bank at the time, but had remitted in their own behalf, and for customers to the Toledo bank, a still larger amount of paper for collection, on which last paper they supposed themselves liable. Whether they were or were not, they surely had a right to retain the moneys of the Toledo bank until there was a final adjustment of balances. Their rights were first to protect themselves; and on this ground alone they had a right to decline honoring these checks.

The bill-holders have not a lien on the funds in the hands of the American Exchange Bank, nor have they a claim upon the bank in its corporate capacity for non-payment of the checks.

The several suits at law, which these bill-holders have brought, will be dismissed.

The decree in this suit will be, that the bill-holders are not proper parties to interplead for the fund in this action.

They are wrong in suing the American Exchange Bank. The American Exchange Bank is wrong in asking that they be decreed to interplead.

The bank will not, therefore, have costs on the dismissal of the suits brought by the bill-holders; nor will the bill-holders have costs against the American Exchange Bank for bringing them in as parties in this suit. In the decree in *this action* nothing will be said respecting the suits brought by the bill-holders. They are only mentioned here for the reason that the cases were all tried together by direction of the court. They

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will all be treated as suits distinct, however, from this, but one opinion will answer for all. Still, the bill in this suit will not be dismissed as to those bill-holders. It may be a question, and a serious one, whether, as creditors of the Toledo bank, they should not be paid their debts before the moneys, now in the American Exchange Bank, are delivered over to the receivers to be taken from the state.

The parties are now all before the court; the claims of each one can be established, and the equities as to all settled. For that purpose the bill-holders will be retained as parties.

The decree will provide that the receivers and attaching creditors interplead for the fund.

It will provide that the bill-holders hold their several demands against the Toledo bank as set forth in the complaint. After it has been adjudged which of the two interpleading parties is entitled to priority, it will provide that the bill-holders may ask that their several claims be paid out of these funds as against the receivers, and before said receivers shall take such funds from the court; but it will also provide that under no circumstances can the bill-holders have priority upon such fund over the attaching creditors.

All questions of cost, not above passed upon, are reserved until the final decree.

NEW-YORK COMMON PLEAS.

A MARTINON DE SANTES agt. P. N. SEARLE.

A *motion* to strike out parts of a pleading as frivolous, is not governed by the rule applicable to *demurrers*: that is, if any part of the pleading is held good, the motion must be denied.

On motions, the court is not limited to granting the whole or none: they may be granted in part and denied in part.

Where the allegation of the plaintiff is, that the bill of exchange was made payable to the plaintiff, and was delivered to him; and the answer says, that the defendant has not any knowledge or information sufficient to form a belief whether the plaintiff is now the lawful owner and holder of the same, the answer is *frivolous*. There is no such allegation in the complaint as the answer attempts to put in issue, and none is necessary. A material issue might be taken on those that are made.

—
General Term, Nov. 1855.

THE motion is to strike out parts of an answer as frivolous.
The action is to recover on four bills of exchange.

— — — — — *for motion.*
— — — — — *opposed.*

INGRAHAM, First Judge. To the first bill mentioned in the complaint the defendant sets up in his answer matter in payment thereof. This is not objected to by the plaintiff.

To the second and third bills mentioned in the complaint, which are stated as having been made payable to the plaintiff, and having been delivered to him, the defendant in his answer says that he has not any knowledge or information sufficient to form a belief, whether the plaintiff is now the lawful owner and holder of the same.

There is no such allegation in the complaint as the defendant attempts to put in issue by this part of the answer; nor was it necessary that the complaint should contain it. The facts alleged are the making of the bill and the delivery to the plain-

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tiff, to whose order it was payable. On either of these allegations the defendant, by a denial, could take issue. If he cannot do so, he has no defence to make by way of denial. If the plaintiff, since he received the bill, has passed it away to another person, that fact should be set up affirmatively in the answer, and in that way an issue would arise on the pleadings. The answer to the second and third count in the complaint is bad, and forms no defence.

The answer to the fourth count, or fourth bill of exchange, denies any knowledge, &c., as to the endorsement of the bill of exchange by the payee. This is undoubtedly sufficient, and forms a valid answer to the complaint in this respect, so as to render proof of that endorsement necessary on the trial of the cause.

It is objected that the motion is for judgment as to three counts, and is in the nature of a demurrer, and that if any one of the answers is good, the motion must be denied.

I do not understand that rule as applicable to a demurrer, to apply to a motion. The reason of the rule is, that a demurrer admits everything contained in a pleading to be true; and if so, and one part of the answer forms a good defence, the pleading cannot be said to be frivolous. Here, however, no such admission is made, and, on motions, the court is not limited to granting the whole or none. It is frequently the case that a motion is granted in part and denied in part. In such a case it may affect the question of costs, but not the right to grant the relief in part which is asked for.

In the present case the motion is granted as to the second and third bills of exchange mentioned in the pleadings. So much of the answer as refers to those bills is to be stricken out.

SUPREME COURT.

LIVERMORE and others agt. JENKS and others.

Where an order is properly made, removing a cause from this court into the supreme court of the United States, it has passed the stage when this court can act or take any proceeding in it.

A *vacating* of the order removing it could not empower this court to proceed with it, or revest it with jurisdiction over the case in any form. There is an entire want of *legal discretion* on the part of this court to retain the case longer.

New-York Special Term, June, 1855.

MOTION on behalf of the plaintiff, Livermore, to vacate an order heretofore made, removing this cause into the supreme court of the United States.

— — — — *for motion.*
— — — — *opposed.*

COWLES, Justice. This case seems in all respects to have been one capable of removal, on the defendant's motion, into the federal courts.

The plaintiff is a resident of this state, and all the defendants, except Harris, of Rhode Island. As to Harris, although nominal as a party defendant, yet no relief is asked as to him, and therefore he cannot be regarded as a party, so as to obstruct its removal into the United States' courts within the meaning of the act of 1789.

The case being one which seems properly so removable, it becomes the *right* of the defendants to institute their proceedings to effect that object, and over the exercise of that right the state courts can have no control, further than to see that the facts warranting such removal sufficiently appear, and that the proper papers are filed.

When the proper papers are presented, the state court has

Livermore and others agt. Jenks and others.

not the *legal discretion* to refuse an order removing the cause. (Gordon agt. Longest, 16 Peters, 97.) And if this court should proceed in the action after the presentation of the petition, and the taking of the other steps requisite to a removal of the case into the federal courts, such proceedings would be *coram non judice*. Every order made by the state court would be a nullity; and that, too, even though the state court had by order made, refused to allow the case to be sent to the federal court. (*Act* 1789, § 12; 16 Peters' Rep., above cited; Kanouse agt. Martin, 15 How. U. S. R. 198.)

I cannot see how, under the above adjudications, the plaintiff here can, in any way, be benefited by a vacatur of the order. The defendants have filed the proper papers, and given the proper security, for the removal of the cause to the United States' court.

Having done so, any order subsequently made, or any step subsequently taken in the suit in the state court, would be *coram non judice*.

An order to amend, if granted, could be of no avail, and the error so committed by the state court would be disregarded, or set aside as error, by the United States' court.

But it is sufficient, without discussing the consequences of an attempt by the state court to retain jurisdiction, to say, that there is an entire want of *legal discretion* on the part of this court to retain the case longer. It has passed the stage when this court can act or take any proceeding in it. A vacating of the order, removing it, could not empower this court to proceed with it, or revest it with jurisdiction over the case in any form.

The motion to vacate the order, removing the cause to the United States' court, must, therefore, be denied, but without costs to either party.

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SUPERIOR COURT.

GEORGE CARPENTER and others agt. THE NEW-YORK & NEW-HAVEN RAILROAD COMPANY.

A voluntary appearance of a defendant is equivalent to personal service of the summons upon him.

And a cause may proceed under the Code upon an *answer*, without any formal *appearance*, or notice of *retainer* or *appearance*, ever being filed or given.

On the 15th of September, 1855, the summons for relief, with process of attachment, were served upon the defendants, under the 134th section of the Code. On the 6th of October, a petition to transfer the cause into the circuit court of the United States, was filed, and a regular appearance of the defendants entered with the clerk, and a bond filed.

Held, that the petition was filed in *time*, on the 6th of October, the plaintiffs not having taken any steps to obtain judgment, although entitled to it on that day.

After the removal of the cause into the circuit court, which is effected by the statute, without an order, it is in the power of the plaintiffs to take the pleadings from the state court, in which the proceedings are stayed, and have the cause expedited in the circuit court, if they wish it.

The *attachment* is, by statute, preserved in force; and whatever steps are necessary in relation to it, should be the subject of a special application.

Special Term, October, 1855.

PETITION by defendants to remove the cause to the circuit court of the United States.

J. E. BURRILL, jr., *for plaintiffs.*

WM. CURTIS NOYES, *for defendants.*

HOFFMAN, Justice. The summons in this action was for relief, with the usual clause, that if the defendants did not answer within twenty days after service, application would be made to the court for the relief demanded in the complaint. The complaint was not served with it.

On the 15th of September, 1855, the summons, with process of attachment, were served upon the defendants, under the

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134th section of the Code. On the 6th of October, a petition to transfer the cause was filed, and a regular appearance of the defendants entered with the clerk, and a bond proffered and filed. Upon this an order to show cause why the cause should not be removed was made, returnable on the 9th of that month.

On the return-day of the order to show cause, the parties appeared; and the application is resisted chiefly upon the ground that the time for answering had elapsed on the 5th of October; that the time for appearance, under the Code, was the time limited for answering; that without an application to the court, the party would not be let in; and that as the party was, as a matter of right, entitled to judgment on the 6th, the petition and appearance were filed too late.

It is to be noticed, that neither the 128th nor the 129th section of the Code, refer in any way to an appearance to be required in summons, to be entered. The 130th section provides that a copy of the complaint need not be served with the summons, and then directs that when the complaint is not served with the summons, the former must state where it is, or will be filed. Then the 130th section provides, that where a copy of the complaint is not served with the summons, if the defendant, within twenty days after service, causes notice of appearance to be given, in person, or by attorney, demands in writing a copy of the complaint, such copy must be served within twenty days, &c.

The seventh rule of the supreme court provides, that service of notice of appearance, or retainer generally, by an attorney, shall in all cases be deemed an appearance. And the plaintiff, on filing such notice at any time thereafter, may have the appearance of the defendant entered, as of the time when such notice was served.

In *Quin agt. Tilton*, (2 *Duer* 648,) Justices DUEK and OAKLEY held, that an order obtained by a defendant extending the time to answer, founded upon his affidavit that he had employed an attorney, and his absence from the city, was equivalent to a formal notice of appearance in the action.

So in *Higgins agt. Rockwell*, (2 *Duer*, 650,) it was held by

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Justice BOSWORTH, that any one against whom, personally, a judgment is prayed, has a right to appear and answer, although no summons is served upon him. Such a voluntary appearance subjects him to the same liability as if he had been personally served.

This and similar cases in this court have been determined under the 139th section, declaring that a voluntary appearance of a defendant is equivalent to personal service of the summons upon him.

And in the late case of *Cooledge* agt. *Lawrence*, the general term of this court has held, that not merely the use of an answer in a case in resisting a motion for an injunction, and the appearance and argument of counsel, but that affidavits, endorsed by an attorney for the defendant, and such appearance and argument, was such an appearance as to prevent a removal to the court of the United States, upon a petition presented eight days afterwards.

It is, therefore, apparent that a cause may proceed under the Code upon an answer, without any formal appearance, or notice of retainer or appearance, ever being filed or given.

The section under which the present case proceeded, enabled, as before shown, the plaintiffs to apply to the court for judgment on the 6th of October, but not before. An application to the court was essential. Suppose that on that day at the moment when judgment was applied for, the defendants had appeared in open court and tendered an answer, I think the defendants would have been considered as appearing and answering, without the necessity of an order to let them in.

The case of *Abbott* agt. *Smith*, (8 *How. Pr. R.* 463,) appears to be much in point. It was decided, that notice of appearance or retainer might be served after a default, and before judgment entered, in every case where an assessment of damages by the clerk was necessary. And hence an order that the plaintiff file security for costs obtained after the default, but before the judgment, was held regular. The case of *White* agt. *Featherstonhaugh*, (7 *How. Prac. R.* 357,) is substantially overruled, and upon reasoning which appears well founded.

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That case arose under the first subdivision of section 246; the present, under the second subdivision. That provides, that in all other actions (than those enumerated in the first) the plaintiff may, upon the proof of service, apply to the court after the expiration of the time to answer, for the relief demanded in the complaint. That relief would be controlled by the 275th section.

Again: the general rule at law was, that a defendant's plea was regular, though served after the time it was due, if before his default was entered. (1 *John. Ca.* 413; 10 *Wend.* 634.) The cases of *Havens* agt. *Dibble*, (18 *Wend.* 655,) and *Brainard* agt. *Hanford*, (6 *Hill*, 368,) do not contradict this rule. The same was the practice in the court of chancery. A demurrer, and of course an answer, could be entered after the allotted time, until the defendant was affected by process of contempt. (1 *Hoffman's Chan. Pr.* 213, and cases.)

I think, therefore, that the petition was filed in time on the 6th of October, the plaintiffs not having taken any step to obtain a judgment. I therefore omit to consider the effect of the order of the 6th of October, which may be liable to very serious objections.

The counsel objects that the bond is wholly insufficient in amount; that this is the only security the plaintiffs have for the prosecution of the case in the circuit court; and that the defendants may omit to carry the pleadings and process there; and thus delay the cause at their will.

The case of *Martin* agt. *Kanouse*, (1 *Blatchford's C. C. R.* 149, and cases,) shows the course of practice after the cause is removed; and upon a consideration of the act of congress, it appears to me that it is in the power of the plaintiffs to take the pleadings from this court, and have the cause expedited in the circuit court, if they wish it. The removal of the cause is effected by the statute, without an order. The proceedings are stayed in the state court.

As to the attachment, the statute undoubtedly preserves it in force. I am not aware whether any or what steps are requisite in relation to it. But certainly, if any step is proper, the

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one court, or the other, must possess the power to direct it. It should be the subject of a special application.

The order to be entered will be as follows :—

“SUPERIOR COURT.

“GEORGE CARPENTER and others agt. THE NEW-YORK & NEW-HAVEN RAILROAD COMPANY.

“Special Term, Oct. 9, 1854.

“A PETITION having been filed by the defendants in this cause, at the time of entering their appearance therein, on the 6th of October inst., praying for the removal thereof to the circuit court of the United States for the southern district of New-York, and offering good and sufficient surety, for their entering in such court on the first day of its session, copies of the process herein against them; and also for their there appearing and entering special bail in the cause, if special bail was originally requisite therein; and an order to show cause why the prayer of such petition should not be granted, having been made on the said 6th day of October instant.

“Now, upon motion of Mr. Noyes, of counsel for the defendants, and hearing Mr. Burrill in opposition thereto, it is declared, that it is made to appear to the satisfaction of this court, that the present suit is commenced by citizens of the state of New-York against a citizen of the state of Connecticut, and that the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs. And it is further declared and ordered, that this court doth accept the surety offered; and that all proceedings in the said cause in this court be, and they are hereby stayed.”

In order to hear any objection to the right, as well as to the sufficiency of the security, it is proper that the application should be on notice, or an order to show cause. I have drafted an order to show cause, and also for the removal of the cause, which have been approved by two of the judges; and may assist in governing the proceedings in this court hereafter.

Cramer and another agt. Eliza Comstock and others.

“SUPERIOR COURT.

“GEORGE CARPENTER and others agt. THE NEW-YORK & NEW-HAVEN RAILROAD COMPANY.

“*Special Term, Oct. 6, 1854.*

“*Present, HON. MURRAY HOFFMAN, Justice.*

“THE defendants having this day entered their appearance in this cause, and at the same time filed a petition praying for the removal of this action to the circuit court of the United States for the southern district of New-York, pursuant to the act of congress of the United States in such case provided, and offered the surety as therein provided, by a bond now filed; it is ordered, that the plaintiffs show cause on the 9th day of October instant, at 10 o'clock in the forenoon, at a special term of this court, to be held at the city hall in the city of New-York, why the prayer of the said petition should not be granted.”

“ABIJAH FISHER and others agt. THE SAME.”

(*Same as above.*

SUPREME COURT.

JOHN CRAMER and another agt. ELIZA COMSTOCK and others.

A *married woman*, who has a separate estate, has, in equity, the same power over it; and may sell or bind it by mortgage, as if she were a *feme sole*. She is liable for her *bond* given on the credit of it.

She may also dispose of such estate without the solemnity of an acknowledgment on a *private examination*.

Whether judgment for deficiency on foreclosure and sale of mortgaged premises, can be rendered against the wife. *Queri?*

Cramer and another agt. Eliza Comstock and others.

Saratoga Special Term, Nov., 1855.

THIS was an action brought for the foreclosure of a mortgage given by a married woman on her separate property. The complaint sets up that, previous to 24th day of February, 1851, said Eliza intermarried with one of the defendants, Peter Comstock, and was still the wife of said Peter; that on the 24th day of February, said Eliza being seized, in her own right, of the premises described, and for the purpose of securing to the plaintiffs the payment of the purchase money of said lands, did execute, and deliver to the said plaintiffs, a bond, bearing date on that day, whereby she bound herself to pay the sum of six hundred dollars; and as collateral security for the payment of the said indebtedness, she did, at the same time, duly execute and acknowledge, to the said plaintiffs, a mortgage with power of sale. The complaint then makes all the other *usual* allegations in a foreclosure suit, and asks, by way of relief, that the premises be decreed to be sold; and further, that the said *Eliza* be adjudged to pay any deficiency.

The defendants, Peter Comstock and Eliza his wife, set up, by way of answer, the following, to wit:—

“The defendants, Peter Comstock and Eliza his wife, in answer to the complaint, first submitting and insisting that the said complaint does not state facts sufficient to constitute a cause of action against these defendants, or either of them, say that, at the time of the alleged execution of the said bond and mortgage by the said Eliza, as in said complaint set forth, the said Eliza was the wife of said Peter; by reason of said coverture the said bond was *void*; the said mortgage, collateral to said bond, was also *void*.

“And for a further answer, these defendants say, upon their information, that the said mortgage was not acknowledged pursuant to the form of the statute. That the said Eliza did not acknowledge before an officer authorized by law to take such acknowledgment, on a private examination, apart from her said husband.”

Cramer and another agt. Comstock and others.

The plaintiffs moved for judgment on the ground of the *frivolousness* of the answer.

CHARLES CRAMER, *for plaintiffs.*

JOSHUA M. TODD, *for defendants.*

BOCKES, Justice. Mr. Justice PARKER, in the *Albany Fire Insurance Company* agt. *Bay*, (4 Barb. 407-415,) remarks that in all cases where the wife has a separate estate, no matter how it was created, it may be made liable to the payment of *her note or bond* given on the credit of it; and she has, in equity, the same power over it, and may sell it or bind it by mortgage, as if she were a *feme sole*. This case was taken to the court of appeals, where this doctrine was affirmed. (4 Com. 9, and cases cited in opinions of the judges.)

It is also decided in this case, that a married woman may dispose of her separate estate without the solemnity of an acknowledgment on private examination. (4 Com. 9; 17 Barb. 660: see also *Willard's Eq. Jur.* 644, et seq. on whole case.)

These authorities show the answer frivolous. Every question raised by it has been expressly adjudicated.

A question remains on the complaint itself: the plaintiffs claim judgment against Mrs. Comstock for any deficiency there may be after sale.

This question it is unnecessary now to decide; but that can be determined on plaintiff's application for final judgment on the report of amount due, or when the case is in readiness for judgment as to all the defendants. (See *Chapman* agt. *Lemon*, ante page 235.)

Inasmuch as it does not appear before me, how the case stands in regard to the defendants, other than Comstock and wife, perhaps it would be well, in the order to be entered on this motion, to give permission to plaintiffs to take any further proceedings in the cause necessary to bring it to final judgment as to all the defendants. I have drawn the order with that view, though perhaps this part of it may be superfluous.

SUPREME COURT.

CATHARINE FLEET agt. JANE A. DORLAND and others.

The statute requires that, to warrant a *partition*, the application be made "by one or more of *such* persons" as shall "*hold and be in possession* of any lands as joint tenants, or tenants in common."

Now, where parties claim reversionary interests in premises, which are in *possession* of another—a tenant, and subject to his life estate, they cannot bring a suit for *partition*—not having any possession either actually or constructively. And where, in such case, there are *infant* defendants, the *court* is bound to notice the objection, whether taken or not.

The court has no authority, in a partition suit, to order a *sale* of the premises, "unless the court shall be satisfied that they are so situated that a partition thereof cannot be made without great prejudice to the owners."

It seems, that arrears of *taxes* and *assessments* furnish no ground for ordering a sale or partition of the premises.

Where there is an outstanding *life estate* in the premises, it is chargeable with the whole of the annual *taxes*, and with "a just and equitable apportionment" of the assessments for local improvements according to its probable duration.

And the act of 1841 makes provision (by bill) for enforcing the payment of taxes and assessments, if the parties will not voluntarily contribute their shares.

New-York Special Term, January, 1854.

APPLICATION for partition, &c.

— — — — — *for motion.*

— — — — — *opposed.*

ROOSEVELT, Justice. The plaintiff is the reversionary owner of only one-third, while the defendants represent two-thirds of the premises, said to be held in common. She asks a sale, to divide the proceeds—they a reference, to divide the land. She insists that a sale is best for the interests of the defendants; the defendants rejoin that they themselves are the best judges of their own interests.

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Under these circumstances, as there is no serious difficulty, at the proper time, in effecting an actual partition of the premises in question, to make the decree of sale asked for by the plaintiff would be, as I conceive, an arbitrary interference with the rights of property—compelling owners, under color of a partition, to sell their land against their will, and turning real into personal estate, to the great hazard of minors, and to the injury of those who, in case of death, would be their heirs. It would be exercising a power inconsistent with the spirit of the constitution, and inconsistent with both the spirit and letter of the statute. The court has no authority in a partition suit (2 R. S. 323) to order a sale of the premises, “unless the court shall be satisfied that they are so situated that a partition thereof cannot be made without great prejudice to the owners.” (*Tucker agt. Tucker*, 19 *Wend.* 226.)

Now, the land in the present suit consists of a large number of vacant lots, lying between Fifty-fourth and Fifty-fifth streets, and Broadway and the Eighth avenue, in this city, composing nearly the whole block, and of a small gore on the south side of Fifty-fourth street.

It is perfectly obvious, that such a plat, so far as its formation is concerned, can be divided into three equal shares, not only without “great,” but without the slightest “prejudice” to any of the owners.

But it is said there are large arrears of taxes and assessments. It may be doubted, I think, whether that is a consideration which, in any case, can lawfully influence the judgment of the court; in other words, whether, without doing great violence to language, it can be said to be an element in the “situation” of the premises. Waiving, however, that view of the meaning of the statute, where is the difficulty in apportioning these liens, if not already done? And if either party, after such apportionment, wishes to do so, can he not, by mortgage, raise the requisite sum to discharge his separate share? The plaintiff is an adult, and needs no interference of the court in that aspect. The same may be said of Mrs. Dorland. And

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as to Miss Horn, the infant, who will soon be of age, her guardian is the proper person to attend to her interests. He, as he has a right to do, repudiates the advice and solicitude of the plaintiff, however well meant, on behalf of his ward. He, and not the plaintiff, is responsible for the guardianship; and it will be for him, in the exercise of an honest discretion, to determine, in the first instance, how his ward's share of the taxes and assessments is to be raised.

From the papers, it appears that there is an outstanding life estate in the whole premises. That estate, therefore, is chargeable with the whole of the annual taxes, and with "a just and equitable apportionment" of the assessments for local improvements, according to the probable duration of Mrs. Cozine's life. And the court, according to the principle of the act of the 26th of May, 1841, is bound to enforce such apportionment—and the more so, as there is a homestead on the premises, of which the life-tenant has the sole occupancy.

Nor is this the only difficulty arising from the life estate of Mrs. Cozine. So long as she lives, she, and she only, in the language of the statute, "holds, and is in possession of the premises." How, then, can any partition be had? She is not a joint tenant, or a tenant in common with any person; and the other parties, although jointly interested in respect of each other, are not tenants in common in possession. The statute is positive, that to warrant a partition, the application must be made "by one or more of *such* persons" as shall "*hold and be in possession* of any lands as joint tenants, or tenants in common."

Now, the plaintiff in this case is not only not in possession, either actually or constructively, but has no right even to possession, and will have none till the death of the life-tenant. The suit, therefore, is premature. And the court, on behalf of the infant defendant, whether taken or not, is bound by law to notice the objection. (*Burhans* agt. *Burhans*, 2 Barb. Ch. R. 398; *Brownell* agt. *Brownell*, 19 Wend. 365.)

The objection goes to the very jurisdiction of the court, and

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strikes at the foundation of the proceeding. The purpose of a partition is the severance of a joint possession. How, then, in the nature of things, to say nothing of the words of the statute, can there be a partition where there is no possession—and even no “present estate”? (Ch’r WALWORTH, *supra*.)

As to the taxes and assessments, if the parties will not voluntarily contribute their shares, the act of 1841 makes provision for the case, and authorizes a bill to be filed by any person interested in the estate to compel a just and equitable apportionment; to extend, if necessary, the period of redemption; to order a sale of any part or parts, in fee, to pay the tax or assessment, or to effect the redemption; and to adjust all the equities of the parties according to their estates and interests, whether present or future, “in possession, reversion, or remainder.”

On such a bill, all that is at present necessary or proper to be done, in regard to this property, can be accomplished with great ease and dispatch, and at a comparatively trifling expense. I feel the less reluctance, therefore, in dismissing, as I am constrained to do, the plaintiff’s application for a partition or sale of the entire premises.

Complaint dismissed with costs, but without prejudice.

COURT OF APPEALS.

JOHN BROWER and JACOB CRAM, appellants, agt. ENOCH W.
PEABODY, respondent.

Where goods were contracted to be sold for a specified sum—*cash upon delivery*—and were, in pursuance of the agreement to sell, delivered on board of a vessel, and receipts in the usual form were given by the officer of the vessel, stating that they had been received from the seller; and the purchaser subsequently (on the same day) stole the receipts from the seller, and procured a bill of lading from the owners of the vessel in his own name, drew a bill of

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exchange against the shipment, assigned it to a third person, who, in good faith, advanced a large sum of money upon it; and the master of the vessel, on demand, refused to recognize the right of the seller to the goods, and refused to deliver them to him, but disposed of them in Liverpool, by the orders of other persons,

Held, in an action by the seller against the master of the vessel, that there was no delivery of the property; the seller never parted with the possession; he placed the goods on shipboard in his own name, and took and retained in his custody the receipts furnished by the defendant, which gave him the control of the property, and bound the defendant to execute, or withhold the bill of lading according to his direction.

The *onus* devolved upon the defendant to establish a legal right to interfere with the property, without the consent and against the wishes of the seller and owner.

The act of the purchaser, through which the defendant was compelled to make title, was a *felony*. The receipts, although recognized as *prima facie* evidence of property in the thing receipted, in those who have them in possession, do not, like bank notes, become the property of a *bona fide* holder.

The defendant converted the property; and this act, apparently unauthorized and tortious, he justified under *evidences of title stolen* from the possession of the owners. The defendant, to release himself from liability, should show affirmatively a transfer of the property in bar of the action. (*This decision overrules the same case, reported 10 How. Pr. R. 125.*)

October Term, 1855.

THIS was an action brought by the appellants against the respondent under the following circumstances, as found from the evidence in the case, viz.: On the 7th of October, 1850, Brower, on behalf of himself and Cram, made an agreement with Lovett & Co., to sell them fifty casks of potashes for \$1,657.08, to be paid for—*cash on delivery*. Lovett & Co. were then insolvent, and unable, and did not intend, to pay for them; that immediately after making the agreement, Lovett went to the office of Charles H. Marshall & Co., owners of the ship *Fidelia*, of which the respondent was master, and which was then up for a voyage to Liverpool, and engaged freight for said casks, in pursuance of the agreement to sell.

The appellants sent by their cartman and put on board said ship the casks, and took from the mate receipts in the usual form of ships' receipts, thirty-eight of which stated them to have been received from said Brower; and as to twelve of the

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casks, the receipts did not state from whom they were received. The delivery on board was completed on the morning of the 9th of October, 1850; and about 10 or 11 o'clock in the forenoon, the carman took all the receipts to Brower's office, and laid them on a desk at which Brower was writing; at about the same instant, Lovett entered the office, and stole and carried away said receipts, and in the course of the same day he presented them at the office of the said ship, and procured a bill of lading for the casks in his own name, drew a bill of exchange against the shipment, and assigned the bill of lading to Richard Hasluck, who advanced to him, in good faith, upon such security, 1,453.83.

The respondent and the owners of the ship, and said Hasluck, all acted in good faith in the said matter, and had no reason to suspect any fraud on the part of Lovett, and had no notice of such fraud until several days after the bill of lading had been delivered, and the money so advanced. Brower's office was at the corner of Water-street and Coenties-slip, and the ship lay at the foot of Beekman-street, and Marshall & Co.'s office was at No. 38 Burling-slip, in the city of New-York.

Brower, as soon as he discovered the absence of his receipts, went in pursuit of Lovett, and found him on the 11th of October, and then demanded payment of his goods, or that he should give them up, which he refused.

It was proved that it is the uniform custom among those engaged in the shipping business in the city, to deliver bills of lading to any person who produces the ship's receipts, without reference to the names in them, or without endorsement of the same; it being regarded by such custom merely as *memoranda* by which to make out the bills of lading, and as acknowledgments that the goods are on board. The cause was referred to Lucius Robinson, Esq., as referee, who reported and found the foregoing facts, and gave judgment against the appellants, on the ground that they must be presumed to have known such custom, and were chargeable with unreasonable negligence in not giving immediate notice to the respondent, or to the owners or agents of the ship, of the taking of the receipts by Lovett.

Brower and Cram agt. Peabody.

An appeal was taken to the general term of the supreme court, where the judgment was affirmed by Justices CLERKE and ROOSEVELT,—(MITCHELL, Justice, dissenting,)—(*reported 10 Howard's Pr. R. 125,*) with costs; from which judgment of affirmance an appeal was taken to the court of appeals, and the case argued on the second day of July last, before seven judges of that court, and on the 12th day of October last, said judgment was reversed by the whole court.

FRANCIS BYRNE & JAMES W. GERARD, *for appellants.*
SAMUEL BEARDSLEY, *for respondent.*

By the court—GARDINER, Ch. J. There was no delivery of the property, the subject of this suit, to Lovett & Co., the fraudulent purchasers. The terms of the contract were, *cash upon delivery*; and there is no allegation or proof that the agreement was modified, or changed in the slightest particular; under the agreement, as the referee finds, the fifty barrels of potashes were delivered, *not to the purchasers, but on board the ship* of which the defendant was master, and receipts taken, as the answer alleges, in the name of the plaintiff.

The answer of Peabody states,—

“That the receipts so given contained a statement of the receipt, in good order, from the said John Brower, on board the ship *Fidelia*, of the said fifty casks of potashes, describing them by their marks; and in reference to the usage, he avers that the receipts for the goods and merchandise, so delivered on board such ship, are given by the master of the ship or his agent, to the person delivering the same; and that bills of lading are not given to the individuals who have engaged freight therefor, nor to any other person, except on the production or surrender of said receipts to the master or his agent; and upon such production and surrender, bills of lading are forthwith given.”

Looking at the acts of the plaintiff in the light of the contract, and the custom thus established, it is manifest there was no intention to deliver the property to Lovett & Co., and that

the owners never for an instant parted with the possession of the ashes, but placed them on shipboard, in their own names, and took and retained in their custody the evidences of their title, furnished by the defendant, which gave them the absolute control of the property, and bound the ship's master to execute or withhold the bills of lading, according to their direction. To call this a delivery to Lovett & Co., or a general delivery, is a palpable misnomer.

Stopping here, we find the property in the ashes unchanged. They were subsequently demanded of the defendant, who refused to recognize the right of the plaintiffs, and disposed of them in Liverpool, by the orders of other persons. The *onus*, then, devolves upon the defendant to establish a legal right thus to interfere with the property of the plaintiffs, without their consent, and against their known wishes. He relies upon the fact, that the receipts were, on the same day, presented at the office of the owners of the ship by Lovett, who procured a bill of lading in his own name; and in the same sentence the referee also finds that the receipts were *stolen* by Lovett from the office of the plaintiffs. The act of Lovett, through which the defendant is compelled to make title, was a *felony*, for which he could have been indicted and convicted under the 66th section of the article "of Robbery, Embezzlement, and Larceny." (2 R. S. 679.)

If the custom or usage, which lies at the foundation of the defence is valid, the receipts were *property*, "and the value of the commodity affected or transferable by the instrument, would be deemed the value of the article so stolen." (*Id.* § 66.) An argument is unnecessary to prove that a title thus derived, cannot be urged to the prejudice of the true owner. The familiar principle is thus stated in *Salts agt. Everett* (20 Wend. 279):—

"Property in things movable can only pass from the owner by his own act and consent, except in those cases only when such owner has, by his own direct voluntary act, conferred upon the person from whom the *bona fide* vendee derives title, the apparent right of property as owner, or of disposal as agent."

No fact is found or exists in this case to make it an exception to the general rule. The receipts, although recognized as *prima facie* evidence of property in the thing receipted in those who have them in possession, do not, it is presumed, enter into the currency, and, like bank notes, become the property of a *bona fide* holder.

It is said that *nothing but the receipts were stolen; the ashes were untouched*. The defendant converted the property; and this act, apparently unauthorized and tortuous, he justifies under *evidences of title stolen from the possession of the owners*. It seems to have been forgotten that the plaintiffs are not required to prove a negative, but the defendant must, in some way, show affirmatively a transfer of the property in bar of the action.

No reliance was placed upon the facts occurring subsequent to the conversion by the felony, by the learned counsel for the respondent. They can have no influence upon the decision. It may be true, as a matter of fact, what the referee seems to have found, as a conclusion of law, that the plaintiffs would have acted more wisely by giving immediate notice to the ship owners, instead of pursuing the thief, and reclaiming their property; but an error in judgment of this sort, if it was one, cannot divest them of their property, or create a title in the defendant.

The judgment should be reversed.

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SARATOGA COUNTY COURT.

GEORGE MORTON, respondent, agt. DANIEL CLARK, appellant.

In a notice of appeal from a justice's judgment, the *grounds of appeal*, which are required, are not to be stated entirely, if at all, for the information of the justice; because the justice must "make a return to the appellate court of the *testimony, proceedings, and judgment.*" (*Code*, § 360.)

But it is the right of the *respondent* to be informed what questions are to be made in the county court, so that he may prepare for the argument, or procure an amended return if the original, is defective as to any of the "grounds upon which the appeal is founded."

March Term, 1855.

No grounds were stated in the notice of appeal in this action; and the plaintiff's counsel, who had given the usual notice of appearance, objected to any argument, and asked to have the judgment of the justice affirmed.

The counsel for the defendant insisted that it was too late to raise that objection, since the plaintiff's counsel had given notice of appearance, and the cause was regularly brought on for argument. It was also argued that the grounds of appeal were required only for the information of the justice, and, as he had made his return, the plaintiff had no right to object.

The appeal was then argued on the merits, the respective counsel agreeing that the court might pass upon the preliminary objection raised by the respondent's counsel, and the merits of the case at the same time.

W. B. LITCH, *for appellant.*

L. B. PIKE, *for respondent.*

M'KEAN, County Judge. By the practice as it existed before the Code, the party applying for a *certiorari* to review a justice's judgment, was required to make an affidavit, "setting forth the substance of the testimony and proceedings before the justice, and the grounds upon which an allegation of error

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was founded." (2 R. S. 255, § 171.) And it was held that an affidavit which omitted to state any grounds, was insufficient. (*The People ex rel. Roe agt. The Suffolk Com. Pleas*, 18 Wend. 550.)

By the Code of 1848, the appellant was required to make, or cause to be made, "an affidavit, stating the substance of the testimony and proceedings before the court below, and the grounds upon which the appeal was founded." (Code of 1848, § 303.) An omission thus to state the grounds was fatal. (*Williams agt. Cunningham*, 2 Sand. 632 and note (a); *Thompson agt. Hopper*, 1 Code Reporter, 103.)

The Code of 1852 substitutes a *notice of appeal* for the affidavit, but requires that such notice shall also state "the grounds upon which the appeal is founded." (§ 353.)

Under the old practice, it was the justice's duty to "truly and fully answer to all the facts set forth in the affidavit on which the *certiorari* was allowed." (2 R. S. 255, § 178.) And he was required to answer *only* to the facts thus set forth. But, under the Code, the justice must "make a return to the appellate court of the *testimony, proceedings, and judgment.*" (§ 360.) And this he must do, whether the appellant has stated few or many grounds in his notice.

It is therefore obvious, that the grounds of appeal are not to be stated entirely, if at all, for the information of the justice. It is the right of the respondent to be informed what questions are to be made in the county court, so that he may prepare for the argument, or procure an amended return, if the original is defective as to any of the "grounds upon which the appeal is founded."

The notice of appeal in this cause is, therefore, insufficient.

But as it was agreed by the counsel that this question, and the merits of the case, might both be passed upon by the court, it is unnecessary to decide, whether, by giving a general notice of appearance, and omitting to make a motion to dismiss the appeal, the respondent has waived the right now to object.(a)

(a) The case was decided on the merits, and the judgment affirmed.

SUPREME COURT.

PARDEE, &c., agt. SCHENCK.

The amount of *costs*—\$7 or \$12,—(before notice of trial,) is not made to depend on the fact whether an *application* is made to the *court* or not, or whether the *issue* is such that application to the court would be necessary; but on the nature of the *action*, and the mode of service, (§ 246, *sub.* 1, 2,) without reference to the pleadings.

That is, \$7 is allowed when the action is of such a nature that, if the defendant fail to answer, judgment *may* be entered without application to the court; and \$12 is allowed in an action in which judgment *can only* be entered on application to the court, whether the defendant fail to answer or not. (*This agrees with Van Valkenburgh agt. Van Schaick*, 8 How. Pr. R. 271.)

“*Issues* arise upon the *pleadings*, when a fact or conclusion of law is maintained by the one party and *controverted by the other*. (*Code*, § 248.)

The plaintiff, in his complaint, said the defendant owed him \$600 for a note. The defendant in his answer, did not deny it, nor say anything about it; but said the plaintiff owed him \$40, for goods sold. The plaintiff made no reply. *Held*, that there was no *issue* to be tried, and no notice of trial was necessary. The plaintiff could take judgment without a jury, and was therefore not entitled to \$15 trial fee; nor to \$7 for proceedings subsequent to the notice of trial; and was entitled to \$7 only, for proceedings before notice of trial.

At Chambers, Oct. 20, 1855.

MOTION, by defendant, for re-adjustment of costs.

STEELE & OWEN, *for motion*.

MEAD, TAFFT, & DEWEY, *opposed*.

MITCHELL, Justice. The plaintiffs sued for a note of \$600 and over. The defendant, in his answer, did not deny anything stated in the complaint, but set up as a counter-claim that the plaintiff owed him \$40 for goods sold; to this the plaintiff made no reply.

The plaintiff noticed the cause for trial, and the defendant attended, and objected that it was irregular to try the cause, as there was nothing controverted in the pleadings.

Pardee, &c. agt. Schenck.

The judge allowed judgment to be entered, directing the question to be raised at the adjustment of costs, as to what costs the plaintiff was entitled.

The clerk allows \$12 for proceedings before notice of trial, \$7 for proceedings after notice, and \$15 for a trial fee.

The defendant moves for a re-adjustment, and insists that the \$12 should be only \$7, and that the \$15 ought not to be allowed.

In *Van Valkenburgh* agt. *Van Schaick*, (8 *How.* 271-2,) Judge HARRIS said, that in such a case, the action being on contract, if the defendant had failed to answer, judgment would have been perfected in the manner prescribed by the 1st subdivision of the 246th section of the Code. No application to the court would have been necessary. That the criterion is not, as was held in *Lawrence* agt. *Davis*, (7 *Howard*, 354,) whether the pleadings are such as to render an application to the court necessary; but whether the *action* is such that judgment might have been perfected without such application, if no defence had been interposed; that the language of the Code was too explicit to admit of a question.

The contrary decision in *Lawrence* agt. *Davis* was made by Judge ROOSEVELT, and was made after argument on the point, and it is said has been followed by the clerk in this district. Section 307 of the Code, in eight various subdivisions, prescribes the amount of costs to be paid in various stages of the action, beginning at the commencement of the action, and going on to the trial, and to an appeal; subdivision one allows costs to the plaintiff for all proceedings *before notice of trial*, including judgment, when entered, in different sums in two different cases, viz., \$7 "in an *action* when judgment upon failure to answer *may* be had, without application to the court," and \$12 "in an action when judgment *can only* be taken on application to the court."

The \$7 are allowed when claimed in an action where (or in which) judgment upon failure to answer *may* be had without application to the court; that is, when the action is of such a nature that if the defendant fail to answer, judgment *may* be

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entered without application; and the other sum is in an action in which judgment *can* only be on application to the court whether the defendant fail to answer or not.

The amount \$7 or \$12 is not made to depend on the fact whether an application is made to the court or not, or whether the *issue* is such that application to the court would be necessary, but on the nature of the action and the mode of service (§ 246, *sub.* 1, 2,) without reference to the pleadings. Actions on contract are usually simpler than "*other actions*;" and in the last, even if the defendant does not plead, application to the court is necessary; and it is for these reasons that a larger fee is allowed in the last class of actions than in the first.

There is no reason why the extra allowance should be made in this place, when a trial actually takes place, for a special allowance is afterwards made for the costs of the trial, and of the preparations for the trial, viz., \$7 and \$15, and also the term fees.

As to the other charge, there can hardly be a doubt—when the definitions in the Code are observed.

The plaintiff is allowed "for the *trial of issues of fact*" \$15, by § 307, *sub.* 4. Section 248 (203) declares that, "issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and *controverted by the other*."

It is essential that the fact alleged by one party be controverted by the other, to constitute an issue.

Here nothing was controverted; the plaintiff said to the defendant, "You owe me \$600," and the defendant answered, "Yes, but you owe me \$40, and the one should be set off, in part, against the other." This the plaintiff admitted. There was, then, no issue joined; and as "a trial is the judicial examination of the issues between the parties," (§ 252,) there was no trial, and there could be no allowance for a trial fee.

If an issue of fact were joined, a jury would be necessary, (§ 253;) yet the plaintiff could have taken judgment on the pleadings alone, without a jury; and if a jury were called, he could, on the pleadings, recover the precise sum which he did recover; and the amount of the recovery could not, under this

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state of the pleadings, be varied by any testimony that either party could produce.

The plaintiff, therefore, was not entitled to the \$15, nor to the \$7 for proceedings subsequent to the notice of trial—as no notice of trial could properly be given; as to the last, however, there is no appeal.

The plaintiffs must deduct \$20 from the bill as adjusted; and as this decision is contrary to one reported for this district, though in conformity to one previously made and not reported; and as the defendant's default on this motion was once entered with \$5 costs, neither party can have any costs on that default, or on this motion against the other.

On careful examination, I concur,

THOS. W. CLERKE.

J. I. ROOSEVELT.

SUPREME COURT.

OTIS BOYDEN & LORENZO BOYDEN agt. BRADSTREET D.
JOHNSON.

HIRAM FINCH agt. THE SAME.

A *judgment on confession*, which stated the indebtedness to be "for goods sold and delivered, and upon an accounting had on the day when the confession was made," held, entirely *insufficient*.

Such an averment is, of a *conclusion*—not of the facts that led to it.

The Code does not warrant an *inferential* statement; its object is to prevent fraud to the prejudice of *bona fide* creditors. It therefore requires a statement which may be controverted if untrue.

It directs that if the judgment is to be entered for money due, or to become due, there must be a statement of the facts out of which the indebtedness arose.

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(*The opinion of Mr. Justice T. R. Strong in Schoolcraft agt. Thompson* 7 How. Pr. R. 446, which is substantially sustained by the decision in *Chappel agt. Chappel*, 2 Kernan, 215, concurred in.)

If a judgment by confession can be allowed to cover any future indebtedness, it should be particularly specified, and it should be called for by some existing liability.

Where the statement in a judgment of confession is clearly insufficient, the judgment should not be amended so as to allow its lien or priority to stand, because it may appear to the court that the debt for which the judgment was entered was really due, and originated out of a *bona fide* transaction, and that the form of the confession was a misapprehension of the practice. That would give vitality to an act before it had a valid conception.

Brooklyn Special Term, Nov. 1855.

MOTION to set aside judgment on confession and execution in the first above entitled cause.

J. M. VAN COTT, *for motion.*

S. D. LEWIS, *opposed.*

S. B. STRONG, Justice. There is not a sufficient statement of the facts out of which the debt arose, to warrant the judgment by confession in the action first above entitled. The allegation of existing indebtedness is, that it is for goods sold and delivered, and upon an accounting had on the day when the confession was made. The averment is, of a conclusion, not of the facts that led to it.

It is not stated what goods were sold, when the sale was made, nor what amount was due for the goods; nor is it directly averred what the accounting was for, nor how much was due upon that. Possibly it might be inferred that the account was taken for the goods; but the Code (§ 383) does not warrant an inferential statement. The object of the statutory requisition was to prevent fraud to the prejudice of *bona fide* creditors. It therefore required a statement, which could probably be controverted if untrue.

It would be difficult to controvert an allegation of indebtedness for goods sold and delivered generally. A negative, extending over an indefinite period, having reference to the trans-

actions of third parties, and comprehending anything which might be the subject of traffic, could seldom if ever be proved. Where in an allegation of the sale of goods, there is a specification of the property, of the price, and of the time of sale; these are particulars which may aid inquiry, and lead to detection. Not to a certainty, because that is unattainable in human affairs, but with reasonable probability. Besides, a requisition of particularity is often a preventive against perjury, from this greater probability of detection.

The object of the framers of a statute is the best key to its construction, where the language is at all indefinite. The Code did not consider the general allegation of indebtedness as an assertion of a fact within the provision to which I have alluded, because it directs, that if the judgment is to be entered for money due, or to become due, there must be a statement of the facts out of which the indebtedness arose. In the case under consideration, there is no averment of any such fact; there is nothing beyond the general allegation of indebtedness and its nature.

The decisions in this court upon this subject have been conflicting; but I concur with my namesake in the opinion given by him in *Schoolcraft agt. Thompson*, (7 *How. Pr. R.* 446,) as the better exposition of the statute. He referred to the decision of the late supreme court in *Lawless agt. Hackett*, (16 *Johnson*, 149,) requiring a statement as special and precise as in a bill of particulars, in judgments by confession, under the act of 21st of April, 1818, (*ch.* 259, § 8,) as applicable to the provision in the Code. The court, at general term in his district, differed from him; but he was sustained by the court of appeals in *Chappel agt. Chappel*, (2 *Kernan*, 215.) In that case Judge GARDINER said, that the reasoning of the court in *Lawless agt. Hackett*, as to the object and effect of the act of April 21, 1818, is applicable to the provision of the Code in question. The statement in that case of *Chappel agt. Chappel* did not go so far as in this, and the decision may not absolutely control the motion now before me. But the reasoning is applicable; and as it fully coincides with my own impressions, I shall adopt it.

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I do not concur with Judge DEAN in the opinion expressed by him in the case in *Kerner*, that this court, if satisfied that the debt for which the judgment was entered up was really due, and originated out of a *bona fide* transaction, and that the form of the confession was defective, on account of a misapprehension of the practice, and the requirements of the statute, may permit an amendment, thus preserving its lien, or *priority*. That is not warranted by any decision which I have seen, nor would it be proper to give vitality to an act before it had a valid conception. The supreme court, in allowing an amendment in *Lawless* agt. *Hackett*, expressly directed that it should not interfere with the rights of any other judgment creditors, which might in the meantime have attached. As there may be reasons for allowing the judgment in question to be amended on terms, I shall not vacate it absolutely.

The statement in question, so far as it relates to future sales, is objectionable, not only on account of its indefiniteness, but as no fact is stated showing any obligations to sell any goods at any future period. If a judgment by confession can be allowed to cover any future indebtedness, it should be particularly specified, and it should be called for by some existing liability. The Code is explicit, that when the object is to secure the plaintiff against a contingent liability, there must be a statement of the facts constituting the liability. It is equally necessary for the plaintiff to state the facts rendering it incumbent upon him to make future advances.

The judgment in the first-mentioned suit, and the execution thereon, must be set aside as against the subsequent judgment recovered by the plaintiff in the second suit.

No costs are awarded.

SUPREME COURT.

WILLIAM W. HURLBUT and others agt. ISAAC D. SEELEY.

What constitutes a *non-resident*, within the meaning of the law relating to *attachments*?

Where the defendant, a merchant, doing business at Hornellsville in this state, where he owned real estate, and where he and his family resided, in September, 1854, took from his store a large portion of the goods, and went to Hudson, Wisconsin, with the intention and expectation of disposing of them more readily for cash, to pay his debts; and if the trade proved to be good, to continue his trade there in charge of a clerk, and to return himself and continue his business in this state—retaining, in the meantime, his store and business at Hornellsville, in charge of a clerk, where his family remained—intending, as he wrote to his creditors, to return in the spring of 1855, but did not actually return until July, 1855,

Held, that the defendant was a resident of this state on the 29th of June, 1855, when the plaintiffs, his creditors, issued an attachment against his property at Hornellsville. He was only temporarily absent for a single purpose, which, from its nature, would not *keep* him away from the process of our courts.

The probable design of the defendant, as appeared from the affidavits, was to go to Wisconsin only for the purpose of selling out the one adventure; and if a branch should be established there, to leave it under the charge of a clerk, and for the defendant to return to this state. Notwithstanding it appeared that the defendant, in one his letters to his creditors, says, "To avert the fulfilment of this picture, I have forsaken, for the time being, home, wife, children, and friends, and have commenced business upon the very outskirts of civilization."

ROOSEVELT, Justice, dissenting. Holding, that a man, so far as the law relating to attachments is concerned, may travel without apprehension; but the moment he ceases to sustain the character of a traveller, and, for purposes of education or business, takes up a fixed, though temporary abode, he becomes, for the time being, a resident abroad; and, as a consequence, for the time being, in the eye of the law, a non-resident at home, and liable, as such non-resident, to have his property, which he has left behind, attached for the payment of his debts.

New-York Special Term, Sept., 1855.

APPEAL from an order at special term, setting aside an attachment issued in this action.

The attachment was issued by Judge ROOSEVELT, the 29th

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of June, 1855; it recited that it appeared by affidavits that a cause of action existed against the defendant; that he was "*not a resident of this state*," but resided at Hudson, in the county of St. Croix, Wisconsin, &c., and commanded that his property be attached, &c. This attachment was served by the sheriff of Steuben; but on the 10th of August it was set aside by Judge CLERKE, on defendant's motion, at special term. No opinion was written by the judge, but it was understood to have been decided on the ground that the defendant was not a non-resident, but a resident of this state at the time of issuing the attachment.

The attachment was issued on the affidavits of Theodore Parker and others, all made the 29th of June aforesaid. These affidavits show, amongst other things, "that the defendant left the state of New-York in September, 1854, and established himself in business, as a merchant, in the town of Hudson, St. Croix county, Wisconsin, and that he has, ever since the month of September, 1854, continued to reside, and now does reside in the said town of Hudson." That he was "*not a resident of this state*, but" was a resident of said Hudson.

Various affidavits were read on the part of the defendant, on the motion at special term, and several new ones on the part of the plaintiffs.

The facts, as shown by the affidavits, taken altogether, are, that in April, 1853, the defendant resided with his family at Hornellsville, Steuben county, in this state, where he was engaged in merchandising, and in the manufacture and sale of clothing. He lived in a house for which he had a contract of purchase, and owned the store in which he carried on business. He had a branch store in Wellsville, Allegany county, in this state. He had resided at Hornellsville since 1850, and continued to reside there until September, 1854. In the summer of 1854, the defendant went west, in search of a place where he might do a more extensive business, and in July fixed on Hudson, in St. Croix county, Wisconsin, as such a place, and then made up his mind to open a store there. In September of that year, having broken up his branch store in Wellsville,

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the defendant took a large stock of goods from his store in Hornellsville, and went with them to Hudson, where he opened a store and went into trade, which was continued to the time when the attachment issued, the defendant being there in charge of said store the whole time: his family, however, remained at Hornellsville, keeping house as usual—the store in Hornellsville being kept up in charge of a clerk or agent of said defendant. When the defendant left Hornellsville, in September, 1854, he intended, according to the affidavits on his side, to go to Hudson, and remain until he had disposed of the goods he took with him, and others which he intended to purchase while there; and if he found Hudson a good place, to continue his trade there in charge of a clerk. When he left Hornellsville, he expected to return in the spring of 1855, but he did not return until July. The affidavits on the part of the plaintiffs show that the defendant intended, when he went to Hudson, if he succeeded in business, to take up his permanent residence there.

JOHN LIVINGSTON, *for plaintiffs.*

I. If the defendant “was not a resident of this state” when the attachment was issued, it was regular. (*Code*, 1851, §§ 227, 229.)

II. It is not denied that the defendant’s *domicil*, when the attachment issued, was in this state, but he was not then a *resident* here; his *residence* was at Hudson, Wisconsin. (*Code*, 1851, §§ 227, 229; 2 *R. S.* 3, § 1, *sub.* 2–5; 1 *R. L.* of 1818, p. 163, § 23; *In the matter of Thompson*, 1 *Wend.* 43; *Frost agt. Brisbin*, 19 *Wend.* 11; *In the matter of Wrigley*, 8 *Wend.* 140; *Code*, § 100; *Haggart agt. Morgan*, 1 *Seld.* 422; *Ford agt. Babcock*, 2 *Sand. S. C. R.* 518; *Cole agt. Jessup*, 10 *How. Pr. R.* 515; *in the court of appeals*; *Rosevelt agt. Kellogg*, 20 *John.* 210; *Drake on Attachment*, §§ 80, 81, 82, 83, 84, 85, 86; *Moore agt. Budd*, 4 *Hag. Ec. R.* 352; *Stanley agt. Barnes*, 2 *Hag. Ec. R.* 437; *Graham agt. Johnson*, 3 *Ves. J.* 198;

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Shedden agt. *Patrick*, 28 *Eng. L. & E. R.* 64; 1 *Kent. 6th ed.*, 78; *Bur. Law Dic.—Residence.*)

III. The affidavits on which the attachment was issued established everything necessary, and as the judge who issued the attachment thus had jurisdiction, and the attachment was regular, it cannot be set aside on motion founded on new affidavits. (*Conklin* agt. *Dutcher*, 5 *How. Pr. R.* 386; *Bank of Lansingburgh* agt. *M'Kie*, 7 *How. Pr. R.* 360.)

A. J. PERRY, for defendant.

MITCHELL, Justice. The defendant's property was attached on the ground of his being a non-resident of this state. The original affidavits were in general terms, alleging that the defendant had established himself in Wisconsin, and become a resident there—and were *prima facie* sufficient. The defendant moved to set aside the attachment, and produced various affidavits to show that, although he had gone to Wisconsin, it was only for a temporary purpose.

It was understood, on the argument, that the real question was, whether the defendant had gone away on a single adventure to dispose of certain goods, and remained with that single purpose, or had gone or remained there with the intention not only of selling what he took with him, but of establishing there a business which *he* himself should *there* superintend. He had a store at Hornellsville, in this state, and another in Wellsville, and owned real estate here; and had a home here, where he and his wife and children lived. Business falling off very much, he concluded to close the store at Wellsville, and to send his principal clerk, with a portion of the goods from both stores, and some others to be purchased, to Hudson in Wisconsin, to dispose of them there, where sales, though at retail, were more ready, and for cash, and to retain his store at Hornellsville, and remain there with his whole family. This was approved by his creditors, and among others by the plaintiffs. This plan he afterwards changed, so far only that he should go in place of his clerk to Hudson.

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He left the state in September, 1854, intending to return in the spring. Spring came, and he found his sales not so ample as he had hoped, and he wrote that he would return in June. After that he wrote that he would, without fail, and whatever the result might be, return about the first of July. Accordingly, on the 30th of June, he was on his way, in pursuance of that intention, for this state. Both his lawyers, who are partners, his physician, his principal clerk, his foreman, and two other clerks, and some acquaintances, with his mother and his wife, all concur that his original intention was, that he should go to Hudson only to open and commence sales, and with the sole purpose of disposing of the goods and raising money to pay his debts; and that if the business there should be deemed profitable enough to justify the establishment of a branch there, then that Farrell, his chief clerk, "should go and take charge of such branch business, and continue it, and that the defendant *himself* should conduct the principal business at Hornellsville," in this state; and that he never expressed, nor did any of them understand, that he ever formed a different conclusion, except his intention to remain until about the first of July.

All this shows as clearly as could be, a fixed design to go to Wisconsin only for the purpose of selling out the one adventure, and if a branch should be established there, to have it under the charge of the clerk, and not of the defendant, and for the defendant to return to this state. In opposition to this is produced the defendant's letters; and the strongest expression there found against him, is one, when speaking of his efforts to prevent loss to his creditors, he says, "to avert the fulfilment of this picture, I have forsaken, for the time being, home, wife, children, and friends, and have commenced business upon the very outskirts of civilization." This, without any explanation, might show that the defendant had gone there to establish business, and to conduct it himself. But it is the only expression to that effect, and on its face shows that his absence was to be only temporary if the business was to be permanent: for he limits the duration of his absence in saying, "I have forsaken,

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for *the time being*, home, wife, children, and friends." The concurrent affidavits of wife, mother, counsellors, clerks, physician, and acquaintances, are not to be outweighed by that single expression, and they show that he was to be absent only to sell out the adventure which he took with him, or if he found the business there good, then to establish a branch there and return home, and leave the branch in charge of his clerk.

Then, as the special term found, he was still a resident of this state, and only temporarily absent for a single purpose, which, from its nature, would not *keep* him away from the process of our courts, the order of special term should be affirmed, without costs.

I concur in the opinion of Judge MITCHELL.

ROBERT H. MORRIS.

ROOSEVELT, Justice, *dissenting*. An attachment having been issued against the property of the defendant, as a non-resident debtor, was subsequently discharged by the judge, on the ground that the defendant not only had been, (which was admitted,) but continued to be, (which was denied,) a resident of this state. From that order the plaintiffs appeal to the general term; and the question to be determined is, what, in these cases, constitutes non-residence?

The Code, in giving the remedy by attachment, where the party sued "is not a *resident* of this state," has furnished no specific definition of the sense in which it uses this much-litigated form of expression. We are left, therefore, in determining its meaning, to the ordinary rules of interpretation.

Any person, it is well settled, may have his domicile in one place, and his residence, for the time being, in another. Thus a citizen of New-York may retain his dwelling in this city, with its furniture undisturbed, in charge of his ordinary domestics, for a year or more, while he is educating his children in Switzerland, and occupying a hired house in Geneva for that purpose. In such case, it is obvious, New-York continues to be the place of his domicile; and it seems equally obvious that

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he becomes, notwithstanding, a temporary resident of the city of Geneva. But does it follow, say the defendant's counsel, that in becoming a temporary resident of Geneva, he becomes a non-resident, permanent or temporary, of New-York? May not a man have two residences at the same time—a permanent and a temporary one? He certainly may. In the case put of one of our citizens living in Geneva, if asked what was his place of residence he would no doubt answer, using the term as synonymous with domicile, in New-York. This illustration, however, only shows that a man may *have* a *residence* in one place, and at the same time *be* a *resident* in another. And the statute does not say that the debtor's property shall be attached if he has *no residence in*, but if at the time he is *not a resident* of this state. Of what consequence, looking to the object of the law, is it to the creditor that his debtor has a residence, or a dozen residences, in this state, if he himself remains, for years perhaps, out of its jurisdiction, residing actually and personally in Paris or Geneva? Wherein, so far as the creditor's remedy for his debt is concerned, does such residing abroad differ, in its effect, from absconding or concealment? In either case the reason for attaching the *property* arises from the impossibility of summoning the person.

But this reason, it may be said, would apply equally to the case of a debtor merely travelling abroad. The answer is, that on account of the inconvenient restraint upon locomotion, which the allowance of an attachment in such cases would produce, the legislature have, in effect, excepted travellers from the provision. A man, so far as this law is concerned, may travel without apprehension; but the moment he ceases to sustain the character of a traveller, and, for purposes of education or business, takes up a fixed though temporary abode, he becomes, for the time being, a resident abroad; and as a consequence, for the time being, in the eye of the law, a non-resident at home, and liable, as such non-resident, to have his property, which he has left behind, attached for the payment of his debts.

I see nothing unreasonable in this rule; on the contrary,
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while extending all due indulgence to the love of foreign travel, it shows no more than proper regard for the claims of domestic justice. Applied to the defendant's case, the attachment clearly was rightfully granted. He had left his family behind, it is true—but *they* could not be sued; and he had taken up a residence, and opened and kept a store for nine months and upwards in a distant state. I think it pretty evident, moreover, that had his anticipations been realized, his family would ultimately have followed him to their new home. In one of his letters to his correspondent, after visiting the west, he speaks of the place selected by him "to open a store," as a spot where he could "build up a large and profitable trade." In one of their letters to him, his correspondents inquire what, under the circumstances, will be the effect of his "moving,"—showing very clearly the sense in which they understood his declarations. And he, in his reply, instead of correcting this impression, as he no doubt would have done had he considered it erroneous, simply says that he does not "think his *leaving* here"—that is, leaving his original place of business—will have the effect of depreciating his existing property, as his friends suggested.

Five months afterwards, too, writing from the new "place which he had chosen,"—and in which he had, seemingly at least, established himself—after describing the probable consequences of a certain course of procedure, he observes, "Now, gentlemen, to avert the fulfilment of this picture, I have *for-saken, for the time being*, home, wife, children and friends, and have *commenced business* upon the very outskirts of civilization." Surely, the place of which a man could thus write before going to it, and which he could thus characterize after months of actual occupancy, must at least be his temporary residence. And if so, is he not, while personally at it, and far away from his original domicile, properly termed, for the time being, a non-resident of the latter—at least within the true spirit and meaning of the law of attachment?

If the inferences, thus drawn from the defendant's acts and correspondence, had been, to any material extent, erroneous, is

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it to be supposed that, anticipating, as he no doubt did, their suggestion, he would have omitted to contradict them by his own affidavit?

On a question of residence, where, although not conclusive, so much depends on the, perhaps, unrevealed intents of the mind, the unexplained absence of the party's own affidavit,—he being permitted, if disposed, to be his own witness,—is a strong negative circumstance, amply sufficient, as it seems to me, even were the facts otherwise doubtful, to turn the scale against him.

My conclusion, as well on principle as on authority, is, that the defendant, at the time in question, was at least a temporary resident of Wisconsin, and not a resident of this state, and that the order vacating the attachment ought, therefore, to be revoked. (*See the cases cited in note at page 208 of Voorhies' edition of the Code.*)

SUPREME COURT.

JABEZ L. ELLIS agt. JOHN DUNCAN, DAVID DUNCAN, & JOHN P. DUNCAN.

Although the injunction, *sic utere tuo ut alienum non laedas*, is no doubt correct, yet it refers to such injuries only as the law will redress, and not to the large class which are usually denominated *damna absque injuria*. Of the latter class are such as result incidentally to one by the lawful exercise of the rights of another.

Therefore the owner of a farm may dig a ditch to drain his land, or open and work a quarry upon it, when by so doing he intercepts one of the underground sources of a spring on his neighbor's land, which supplies a small stream of water flowing partly through the land of each, and thereby diminishes the natural supply of water, to the injury of the adjoining proprietor. The damage resulting from it is not the subject of legal redress.

Kings General Term, Dec. 1855.

BROWN, S. B. STRONG, and ROCKWELL, Justices.

Ellis agt. John Duncan and others.

APPEAL from an order of special term granting a preliminary injunction.

AMBROSE L. JORDAN, *for plaintiff*.

CHARLES W. SANDFORD, *for defendants*.

By the court—S. B. STRONG, Justice. The question involved in this controversy is, whether the owner of a farm may dig a ditch to drain his land, or open and work a quarry upon it, when by so doing he intercepts one of the underground sources of a spring on his neighbor's land, which supplies a small stream of water flowing partly through the land of each, and thereby diminishes the natural supply of water, to the injury of the adjoining proprietor.

There can be no doubt of the correctness of the injunction, *sic utere tuo ut alienum non laedas*; but I have frequently had occasion to remark that it refers to such injuries only as the law will redress, and not to the large class which are usually denominated *damna absque injuria*. Of the latter class are such as result incidentally to one by the lawful exercise of the rights of another. To award compensation for, or prevent the infliction of such injuries, would seriously arrest the march of improvement, and often so seriously impair the use of property as to render it of little or no value. The distinction between recoverable and irrecoverable damages, in cases of this description, is not very definite or clear. In some particulars the rule has been solemnly settled by uniform decisions, while in others, and generally such as are very near the dividing line, the determinations have been conflicting, and in many there have been none at all. The distinction turns generally, although not universally, upon the question, whether the damages are direct or consequential: in the latter cases, and especially where they result remotely from the exciting cause, they are not generally recoverable.

In the interruption of a surface current, the injury, from a diminution of the water, would seem to be palpable, and so far direct that it would originate a valid cause of action. There,

too, the owners have knowingly permitted the waters to flow in their natural course, for the benefit of all those whose lands they pass, from time immemorial. They have acquired their title with a full knowledge of what is visible, and (peremptorily) of the rights which result from it. But it is different where the principal stream is partially supplied by underground currents. The owners of the superior soil are not generally aware of their existence, and cannot be supposed to have voluntarily acquiesced in any appropriation of them. When they purchase, they are ignorant of any obstacle to the free use of their property *ab centro ad coelum*; and to arrest some valuable improvement, such as digging a well, or a cellar, draining the land, taking valuable stone from a quarry, or leveling the ground for building or agricultural purposes, because it would cause some consequential suspension, and, possibly, inconsiderable damage to another, would seem to be unreasonable and unjust. If the principle, that the man who interrupts a subsurface stream to the prejudice of his neighbor, commits a wrong for which the law will give redress, is sound, no one will be safe in purchasing land adjoining or near a private stream of water, as he may be restrained forever from making some valuable, and frequently, from the progressiveness of the age, necessary improvement.

It seems to me, that the rule that a man has a right to the free and absolute use of his property, so long as he does not directly invade that of his neighbor, or consequentially injure his perceptible and clearly-defined rights, is applicable to the interruption of the subsurface supplies of a stream, by the owner of the soil, and that the damage resulting from it, is not the subject of legal redress. The case of *Actor agt. Blundell* (12 *Mees. & Welsby*, 324) sustains that principle, and the case is cited with approbation by Ch. J. Bronson, in giving the unanimous opinion of the court of appeals in *Radcliff's Executors agt. The Mayor, &c., of Brooklyn*, (4 *Comst.* 200.) The injury of which Mr. Radcliff's executors complained in that case was much greater than any which can result to the plaintiff in this action, from the supposed wrong committed by the defendants;

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and although the facts were somewhat dissimilar, yet the principle which I have been considering is alike applicable to both.

If the injury of which the plaintiff complains had been actionable, I should doubt much the propriety of granting an injunction, unless it had been of a much more serious character than what appears from the papers presented to us. If an injunction should be proper, it must be perpetual, or at any rate, endure as long as the water continues to run. The plaintiff might, in order to prevent an inconsiderable damage to himself, interrupt and prevent improvements of real importance to the defendants, or those who may succeed them. A recovery of damages in an ordinary action would be a much more reasonable remedy; and the plaintiff may resort to that notwithstanding the decision of this appeal.

The order granting a preliminary injunction should be reversed, with ten dollars costs, and the injunction should be dissolved.

SUPREME COURT.

CAROLINE W. SUYDAM, &c. agt. CHARLES SUYDAM and others.

Under §§ 390 and 391 of the Code, a *party* to the suit may, *after issue joined*, be called and examined either, 1st. At the trial; or, 2d. Out of court, on giving five days' notice to attend and be examined; or, 3d. Under an *order* that he attend in less than five days and be examined.

He may also be examined *conditionally*, upon an order made for that purpose, (2 R. S. 390, 391,) or on *commission*, just when any third person might be so examined, and not otherwise.

Whether a party, as a *married woman*, could be so examined—*quere?*

New-York Special Term, Nov., 1855.

THE plaintiff seeks to examine one of the defendants, on five days' notice, under § 391 of the Code. The cause is not at

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issue. The party sought to be examined resides in the state, and is not about to depart—nor is she sick or infirm.

LAROCQUE & BARLOW, *for plaintiff.*
— — — — —, *for defendants.*

COWLES, Justice. She objects that, before issue joined, she cannot be required to attend for examination. Whether she is right in this objection depends upon the construction to be given to §§ 390 and 391 of the Code.

By § 390, a party to a suit may be examined at the instance of the adverse party, in the same way and under the same circumstances that permits any third person to be so examined. That is, he may be called *at the trial*. He may be examined *before or after issue, conditionally*; in other words, *de bene*, under 2 R. S. 391, 392, §§ 1, 2, if sick or infirm, or about to depart from the state. And he may also be examined on commission, just as any third person may be.

Section 390 is somewhat modified by § 391, in this particular. If the adverse party so desires, the opposite party may be required on five days' notice—or even on shorter notice, by order to attend and be examined, instead of attending *at the trial*, and being there used as a witness.

This examination of the witness, under the five days' notice, is a mere substitute for the examination *at the trial*, and can, therefore, be only taken *after issue joined*. With the single exception, that after issue joined, a party may be called, on this five days' notice, to submit to an examination to be read on the trial, or may be actually called to the stand, *at the trial*, at the option of the adverse party, there is no distinction between the time and manner of examining a party to the suit and any third person as a witness.

In order to be clearly understood, it may be stated thus:—Under §§ 390 and 391 of the Code, a party to the suit may, *after issue joined*, be called and examined, either,

1st. At the trial; or,

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2d. Out of court, on giving him five days' notice, to attend and be examined ; or,

3d. Under an order that he attend in less than five days, to be examined.

He may also be examined *conditionally*, upon an order made for that purpose, just when any third person might be so examined under 2 R. S. 390, 391 ; and he may also be examined on commission, just when any third party might be so examined, and not otherwise.

In this case, issue not having been joined, the party called cannot be required to attend.

Whether, as a married woman, she could be examined in the mode proposed, I will not now discuss, as the plaintiff's motion, for the reasons above given, must be denied

This seems right.

WM. MITCHELL.

NEW-YORK COMMON PLEAS.

JOHN ORSER, Sheriff, &c. appellant, agt. MOSES GROSSMAN,
respondent.

An *attachment*, issued under the Code, must, in order to reach a debt due to the defendant in attachment, or other property held by a third person, be executed by the sheriff, by the delivery to the debtor, or person holding property of the defendant, *in person*, of a copy of the warrant, with a notice showing the property levied on. (*Code*, § 235.)

Leaving such copy and notice at the place of business of the debtor with a third person found there, is not a sufficient service of the attachment by the sheriff. Whether the defect can be supplied, and the attachment be made effectual by proof that the papers were afterwards delivered by such third person to the debtor, or person holding property of the defendant. *Dub.*

Whether service of a copy of the warrant, with a notice in general terms, by the sheriff, that he attaches "all property in the hands of" the debtor, or person having property of the defendant, is sufficient to make the attachment effectual. *Dub.*

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Section 236 provides the sheriff with the means of obtaining a particular description of the debt, or property sought to be attached, and the amount thereof; and § 235 requires the sheriff to show, by the notice served, *the property* levied on.

General Term, Nov., 1855.

INGRAHAM, *First Judge*, DALY, and WOODRUFF, *Judges*.

THIS action was brought in the marine court, by the sheriff, to recover a debt which he claimed was due from the defendant Grossman, to the defendants Wm. R. Robinson, Ebenezer P. Robinson, and Wm. G. Barney, under and by virtue of an attachment issued out of the supreme court, in a suit brought by John Martin, jr., and Wm. H. Martin, against said last-named defendants.

Grossman defended this suit upon the ground that he had never been duly served with the attachment and notice; and that it was wholly ineffectual to reach any debt due by him, if any there was.

The defect in the service was two-fold:—

First. That the only service of the attachment and notice shown was, by leaving the same at Grossman's place of business with a person (name not known) who said he was the defendant's representative.

Second. That the notice left by the sheriff was, that he attached "all the property" of the defendant's in the attachment which was or might be in Grossman's hands, without any description of the property or debt, or the amount, &c.

The marine court held the service insufficient, and dismissed the plaintiff's complaint; and the sheriff appealed to the common pleas.

JOHN M. MARTIN, *for appellant*.

JOHN H. LEE, *for respondent*.

By the court—WOODRUFF, Judge. The propriety of the amendment, allowed by the court below, does not properly come in question on this appeal. The amendment was granted

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on the motion of the appellant, and the order does not come under review upon *his* appeal from the judgment.

It is questionable whether a general notice, that the sheriff attaches all property in the hands of the debtor of the defendant in attachment, is a sufficient attachment under the Code.

Section 235 seems to contemplate the service of a notice specifying the particular property levied on, and section 236 furnishes the means of obtaining a disclosure of all the particulars necessary to enable the sheriff to describe the property levied upon with due particularity. If such disclosure be refused, it may be compelled. If a false certificate is given, no doubt an action would lie for the deceit practiced.

But I am of opinion that the amount due from the defendant to the non-resident debtor was not attached at all, because the attachment was not served on the defendant as directed in section 235.

It was left with a man in the defendant's store, and no evidence was given that it ever came to the knowledge of the defendant. The suggestion that it may often be difficult to find the party to be served, is of no more force than if it was urged as a reason for not serving a summons on a defendant personally.

The requirement that the person to whom the sheriff applies with the attachment "shall furnish the sheriff with a certificate designating the amount and description of the property held by him," &c. &c., (§ 236,) "and the amount of the debt owing to the defendant," clearly indicates that the notice is to be served on him.

Nothing in the statute warrants the idea that it may be served on an agent or clerk, still less that it may be served on any person who may happen to be in charge of the place of business of the party sought. It should, I think, be served on the person who owes the debt sought to be attached. Indeed, the terms of the section are, that the attachment shall be executed by *leaving* a copy of the warrant of attachment *with* the *debtor*, or individual holding the property, *with* a notice showing the property levied on.

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The remedy is extraordinary: it is to operate, in substance, like an assignment, by the absent debtor, to the sheriff; and I think the statute should be strictly pursued. Whether proof that the debtor actually received the copy of the warrant of attachment, and the proper notice, from the person with whom it was left by the sheriff, would make the service complete and effectual, is at best doubtful; but as there was no such proof in this case, it is unnecessary to pass upon that question.

Upon this ground I think the judgment must be sustained. If the judgment in the original suit is still in force, there can be no difficulty in compelling the application of the money in the defendant's hands towards the payment, by proceedings supplementary to execution, unless some other rights have intervened.

SUPREME COURT.

CASPAR TRUST agt. CATHERINE TRUST.

Where a husband asks a decree of divorce from his wife, on the ground of adultery, and the inference from the whole testimony is very strong that he had, for years, abandoned his wife and family, and thrown them upon the world for support, he must present to the court testimony which, *upon its face*, clearly proves the charge of adultery he makes against his wife.

New-York Special Term, March, 1855.

THE facts will sufficiently appear in the opinion.

— — — — *for motion.*

— — — — *opposed.*

COWLES, Justice. This is an application for an absolute divorce, upon the ground of adultery; and the decree is moved for upon the report of the referee, to whom it had been referred to take proof of the facts and report to the court.

If the testimony, as reported, goes to establish the fact of adultery, it would bring the case within one branch of the 64th rule of the court, which requires the plaintiff (as it is not sworn to by the complaint) to put in his affidavit, that five years have not elapsed since the commencement of the alleged open adulterous intercourse between the defendant and Wilson.

Neither does it appear by the papers submitted, why John B. Stephens is named as the next friend of the defendant in the proposed decree and other papers, when another person was appointed such by the order of the court.

But there are other difficulties in the way of a decree.

The testimony is too indefinite, uncertain, and unsatisfactory.

The parties intermarried in October, 1848, lived together about two years, and had one child.

The first witness then says, that after the parties had been married nearly two years, plaintiff left the city, was gone about four years, and returned last fall. He went to the west.

That defendant now lives in Williamsburgh, with Mr. Wilson, and has since last May; that she has lived with him about three years; that she has one child by Mr. Wilson, now about five weeks old; that she knows Wilson and the defendant live together as husband and wife.

That she [witness] has seen the defendant within the last year once, which was last week.

The only witness who testifies to facts, tending in any way to prove adultery, says nothing further as to that fact, than that the defendant lives with Mr. Wilson, and passes by the name of Mrs. Wilson.

Now, the whole of the foregoing testimony, when examined with the least care, fails to amount to that degree of *proof* which should always be given in cases of this description.

It does not appear how the first witness (Mrs. School) knows, nor what means she had of knowing, the facts to which she testifies. She lives in New-York and the defendant in Williamsburgh.

She does not show that she has seen the defendant but once in four years, and that was the week before she testified. How

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the witness knows that the child, now five weeks old, was the child of Wilson, she neither shows nor does she state any facts which render it probable she could know.

How the witness knows that Wilson and defendant live together as husband and wife, she does not state; what means she had of knowing it are not disclosed; nor indeed does she state with sufficient distinctness that she means to swear that such intercourse has been adulterous. What she would call living together as husband and wife, when explained, may mean a very different matter from an adulterous intercourse; but if that is her meaning, she should show more fully how she knew it.

The testimony of the other witness, [Lewis,] as far as relates to a charge of adultery, is, that defendant lives with Mr. Wilson, and "passes by the name of Mrs. Wilson." He does not state with whom she so "*passes*," nor whether she so holds herself out to the world. Possibly some third persons may suppose her to be Mrs. Wilson, and with them she may so *pass*—and yet without her assuming such name, or in any way holding herself out to her neighbors or the world as Mrs. Wilson.

This being the whole of the testimony, and the inference from the proof as it now stands being pretty strong, that the plaintiff has for years abandoned his wife and child, and thrown them upon the world for support, he must present to the court testimony which, upon its face, clearly proves the charge of adultery he now makes—and which, if true, may not unlikely be the result of his previous desertion of her. Possibly such may not have been the fact, but the testimony as it stands leads strongly to that inference.

The plaintiff's motion for a decree must be denied, but with leave to enter an order referring it back to the referee, to take further proofs in the case, and report the same to the court, when a motion for a decree may again be made.

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SUPREME COURT.

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LOWBER agt. SELDEN, CLARK and others.

Where a party, competent to judge for himself, enters into a contract, on a speculation—the purchase of a new invention—and gives his promissory notes in consideration, he is not permitted to turn round, after a failure in the speculation, and ask to have the contract rescinded, on the ground of the want of proper and adequate consideration—especially where such party has acquiesced in such contract for a long time, and has paid one of his notes given thereon.

Because an invention, however promising in its inception, has not yielded the expected golden returns, (as is usually the case,) is no reason, in the absence of all fraud or circumvention, why the person entering into the speculation should not, however disagreeable it may be, fulfil the terms of his engagement—especially after that engagement has been fully executed on one side, and partially on the other.

A party asking for the rescision of a contract, deliberately entered into, must make his election with all due promptness.

A voluntary payment, deliberately and understandingly made, without fraud or duress, cannot be recovered back.

New-York Special Term, 1855.

MOTION to dismiss complaint.

— — — — — *for motion.*

— — — — — *opposed.*

ROOSEVELT, Justice. The object of this suit is to rescind two contracts—one made on the 30th of April, and the other on the 28d of August, 1844—on the alleged ground of “fraud” and want of “proper and adequate consideration.”

The charge of fraud is fully denied, and the attempt to prove it has entirely failed.

As to the question of sufficient consideration, it may be observed, that the transaction, on its face, was a *speculative* one; holding forth, if successful, great hopes of profit, and attended,

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in the event of failure, (as is usual in such cases,) with corresponding chances of loss. Its success was not guaranteed, nor were the probabilities of success misrepresented, nor was advantage taken of the weakness of a sanguine, or of the confidence of a credulous mind. There is nothing to show—nor is it even suggested—that the plaintiff was not as competent to judge of the machine he was about purchasing—and I may add, of the machinery of such bargaining—as either or all of the defendants. All that can be said is, that the invention, however promising in its inception, has not, as yet, yielded the expected golden returns. That is no reason, certainly, in the absence of all fraud or circumvention, why the person entering into the speculation should not, however disagreeable it may be, fulfil the terms of his engagement—especially after that engagement has been fully executed on one side, and partially on the other, and acquiesced in, it may be added, on all sides, not for days or months, but for years.

These contracts, it will be remembered, were entered into more than ten years before the trial, and more than six years before the commencement of the plaintiff's suit, and the notes given under the one made with the defendant, Clark, have been actually paid: as to that, at least, the plaintiff should have taken his stand when, if not before, the notes fell due. His knowledge was then sufficient, and he had then had ample opportunity to understand his rights. He made the payment with his will free and his eyes open. A voluntary payment, deliberately and understandingly made, without fraud or duress, cannot be recovered back—and ought not to be—by action either at law or in equity.

On this point the law, and for obvious reasons, is well settled. And it is equally well settled, as a sound rule of equity jurisprudence, that a party asking for the rescission of a contract deliberately entered into, must make his election with all due promptness. He must take his stand at once, and at the time. Neither law nor equity permits him to alternate, and see-saw from one side of the fence to the other, speculating upon con-

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tingencies to determine which of the two to choose. (3 *Johns. Ch. R.* 23; 17 *Johns. R.* 437.)

One of these contracts—that with the defendant Selden, for the other half of the invention—it is said, is in express terms conditional. It provides, that if the application for a patent should fail, or if the Tatham suit (claiming a prior invention) should be “finally determined against the defendant therein,” then the bargain should be void.

Now, either these conditions have been fulfilled, or they have not. If they have been, the plaintiff has no ground of complaint in any form: if they have not, he has a perfect remedy, without a new suit, by way of defence, in the action already pending against him; and the present litigation is, therefore, in either view, unfounded, or it is unnecessary and vexatious. (See the case of *Selden*, agt. *Pringle*, 17 *Barb.* 458.)

Bill dismissed with costs as to all the defendants.

SUPREME COURT.

LILLIENDAHL agt. FELLERMAN.

The issuing of a *second* execution is not a waiver of supplementary proceedings commenced against the defendant, after the return of the first execution unsatisfied. A similar practice was authorized by the late court of chancery, after filing a creditor's bill.

New-York Special Term, Sept., 1855.

MOTION by defendant to set aside order in supplementary proceedings.

— — — — — *for motion.*
 — — — — — *opposed.*

CLERKE, Justice. Contrary to my first impressions, I now think that the issuing of a second execution is not a waiver of

supplementary proceedings commenced against the defendant after the return of the first execution. These proceedings are a substitute for the creditor's bill, and are merely auxiliary to the ordinary legal method of enforcing the satisfaction of a judgment. To be sure, the Code, like the former law, contemplates that the ordinary remedy should be exhausted, before a recourse shall be had, in the first instance, to the supplemental remedy, and for this reason requires that an execution shall be returned unsatisfied, or that, after an execution has been issued, the defendant has property, which he unjustly refuses to apply towards the satisfaction of the judgment. But, this is not inconsistent with the right, after supplementary proceedings are commenced, also to issue another execution, if the judgment can be more readily or effectually satisfied in this way.

After filing a creditor's bill under the old system, the complainant might have taken out a new execution upon his judgment, and levy upon the property of the defendant; and should such property be insufficient to satisfy his judgment, he would not have been compelled to elect either to dismiss his bill, or abandon his execution.

In the case of *Salt* agt. *Lawson*, decided March 30, 1852, (4 *Sand. S. C. R.* 718,) it was held, in the superior court, that these rules of the court of chancery were as applicable to the examination of a debtor under the Code, as to the proceeding by a creditor's bill. In this view I am inclined to concur.

Motion to discharge order denied without costs.

SUPREME COURT.

JAMES G. WYNHAMMER, plaintiff in error, agt. THE PEOPLE
OF THE STATE OF NEW-YORK, defendants in error

The right to a *bill of exceptions* in a criminal case is given by statute. Its office is to bring up for review questions of law made and decided on the trial. But the statute limits this right to exceptions taken on the trial, to the *main issue*. It is not extended to such as are taken on the trial, of preliminary or collateral questions.

The last clause of the first section of the act, entitled "An Act for the Prevention of Intemperance, Pauperism and Crime," passed April 9, 1855, reads as follows: "This section shall not apply to liquor, the right to sell which, in this state is given by any law or treaty of the United States."

Held, that this right to sell imported liquor, as defined and construed by the United States courts, is limited to *certain persons*, and qualified by the *status of the property*, while it is in the hands of the importer, and in the condition in which it was imported. The laws under which he has imported it, give him a right to sell it in that *condition*. This is the *extent of the right*. When he (the importer) parts with the property, or changes its condition, his right, and *all right* to sell it, derived from those laws, ceases.

Therefore the provisions of the first section of the prohibitory act, will not apply to *imported liquor, while in the hands of the importer, and in the casks, bottles, or packages, in which it was imported*. But imported liquor, sold or kept for sale otherwise than as here stated, is applicable to that section, and is *not exempted* from the operation of the *last clause* of the section.

Held, that the provisions of the first section of the prohibitory act (*see ante page 290*) are *not in conflict with the provisions of the constitution (Art. 6)* of this state, which says, that no person shall be deprived of life, liberty, or property, without due process of law. (*This is adverse to the decisions of Brown and Strone, JJ., in the case of Berberick and Toynbee, ante page 289.*)

The rights and interests of individuals are, to some extent, subordinate to those of the public, and must yield to them in cases of conflict. It is the acknowledged province of legislation to prescribe, by law, such rules concerning the title to property, and its sale and use, as will, in the judgment of the legislature, most effectually secure to the owner the enjoyment of these rights on the one hand, and on the other, protect the public from injuries that may result from the exercise of them. This power, however, is subject to the restraints imposed by the constitution, through which, in this state, the legislature derives its powers.

The protection of the above constitutional provision, in its letter and spirit, extends in equal measure to each individual, and the aggregate population of the

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state, and to *all property*, whether its value is measured by mills or millions. If this constitutional provision applies to such a law as the one in question, it necessarily prohibits many of our police and sanitary regulations—and all our commercial regulations, our quarantine and usury laws. For the attempted distinction between the *essential characteristics* of property, and any of its incidents or qualities which are regarded as elements of its value, whether they *constitute its main value*, or only a small part of it; and between laws which subject certain classes to *some privations*, and laws which affect all classes, and involve great privations, there is no foundation.

The legislature, which exercises the sovereign power of the state, is clothed with the power, and charged with the duty, of promoting its prosperity, by regulating its internal commerce, and holding out suitable encouragements to the industry of its citizens; of preserving the public peace by preventing and punishing crime, and of guarding the health and morals of the people, by such laws and regulations as in its judgment may seem likely to promote these objects, *subject only to the limitations prescribed by the constitution*. The powers of the legislature for these purposes are unlimited. In the choice of the means its discretion is plenary. If, in its judgment, the trade in any article is incompatible with or dangerous to any of these objects of its protection, that trade may be regulated, restricted or *prohibited*.

Eighth District, Erie General Term, Sept., 1855.

THIS is a writ of error to the court of sessions of Erie county, where the plaintiff in error was convicted of a misdemeanor, for selling liquor in violation of the act of April 9, 1855.

The first count of the indictment charged that, on the 5th day of July, 1855, the plaintiff in error, at the city of Buffalo, without having any lawful authority, wilfully and unlawfully sold to some person unauthorized by law to sell intoxicating liquor, to the jurors unknown, one gill of rum, one gill of brandy, &c., &c., (the said intoxicating liquor not being alcohol or pure wine, manufactured by the plaintiff in error,) without having filed, in the office of the clerk of Erie county, the undertaking required by the provisions of the 2d section of the said act; and that the sale of the said intoxicating liquor, in the manner charged, was not authorized by any law or treaty of the United States; and that no right to sell the said liquor was given by any law or treaty of the United States.

The plaintiff in error pleaded not guilty, and the cause came on for trial at a term of the court of sessions, held at Buffalo on the 20th day of July, 1855. When the cause was moved

for trial, the plaintiff in error interposed a challenge to the array of jurors, alleging several grounds of challenge, upon each of which issue was joined by the counsel for the people. The plaintiff in error then moved to quash the indictment, for divers irregularities in impanneling the grand jury. This motion was denied, and the court, by consent of the counsel for both parties, proceeded to try the issues joined on the challenge to the array; and after hearing the proof, the court found and decided that the said challenge was not well taken, and refused to set aside the panel, to which decision the plaintiff in error excepted.

A jury having been impannelled, the counsel for the people gave evidence tending to show that on several occasions, between the 4th and 14th days of July, 1855, the plaintiff in error sold and delivered to several persons, in quantities less than one pint, brandy, at his bar in Buffalo, which was drank on his premises. The people then rested their cause.

The counsel for the plaintiff in error then moved the court to direct the jury to find a verdict of not guilty, on the grounds—

1st. That it did not appear that any offence had been committed by the defendant.

2d. That the charges in the indictment were not proved.

3d. That it did not appear but that the liquor, alleged to have been sold, was liquor the right to sell which was given by laws or treaties of the United States.

4th. It did not appear but that the liquor sold was imported into this country, by the defendant, from foreign countries, in pursuance of laws of the United States.

5th. That the first section of the act in question is in violation of the constitution of this state, and of the United States, and is void.

6th. That the 4th section of said act is likewise contrary to said constitution, and is void.

7th. That the whole act is also unauthorized by, and in conflict with, the laws and treaties of the United States, and the constitution of the state of New-York, and is void.

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8th. That it does not appear but that the liquor sold by the defendant was authorized to be sold by the statute as above referred to.

The court overruled these objections, and the defendant excepted.

The defendant's counsel then offered to prove that the liquor sold by him was imported into this state from foreign countries under the revenue laws of the United States, and that the legal duties had been paid thereon; that the defendant purchased said liquors from the importers in the imported packages; and that the same was drawn from such packages and sold to the persons and at the times proved by the witnesses for the people.

The counsel for the people objected to this evidence as immaterial. The court sustained the objection, and the defendant excepted.

The defendant's counsel then offered to prove that the liquor sold by him was owned by him on and before the third day of July, 1855.

The counsel for the people objected to this evidence as immaterial, the court sustained the objection, and the defendant excepted.

The evidence being closed, the counsel for the defendant requested the court to direct the jury to acquit the defendant on each and all of the grounds before stated by him. The court refused so to charge, and the defendant excepted.

The jury, under the charge of the court, rendered a verdict of guilty; whereupon the court proceeded to render judgment pursuant to the statute, and the defendant sued out a writ of error to this court.

F. J. FITHIAN, *for plaintiff in error.*

A. SAWIN, *for defendants in error.*

By the court—GREENE, Justice. All the exceptions taken by the defendant to the rulings of the court below, on the motion to quash the indictment for irregularity, and on the trial

of the issue joined on the challenge to the array, are improperly incorporated in the bill of exceptions.

Bills of exceptions in criminal cases were unknown to the common law. The right to a bill of exceptions in such a case is given by statute. Its office is to bring up for review questions of law made and decided on the trial. But the statute, which gives the right, limits it to exceptions taken on the trial of the *main issue*. It is not extended to such as are taken on the trial of preliminary or collateral questions. (2 R. S. 736, § 21; *The People* agt. *Freeman*, 4 *Denio*, 21, per BEARDSLEY, J.)

It will, therefore, be unnecessary to examine the various questions raised by these exceptions, as our conclusion on them either way could not affect the result. The same answer must be given to many of the questions suggested by the exceptions taken on the trial of the main issue, and discussed on the argument. The *facts proved on the trial* do not raise the questions; and any opinion which we might express upon them would be the mere result of gratuitous speculation upon questions in which the defendant has no legal interest.

The indictment was for selling brandy (not being liquor the sale of which was authorized by the laws of the United States) to persons not authorized to sell liquor by the act under which the indictment was found. The prosecution proved several sales, by the defendant, of brandy at his bar, in quantities less than one pint, which was drank on his premises. The defendant offered to prove that the brandy sold by him was imported from foreign countries under the revenue laws of the United States; that the duties had been paid thereon; that he purchased it from the importer in the packages in which it was imported, and that it was drawn from those packages, and sold by him, as proved on the trial. The evidence was rejected as immaterial, and the defendant excepted. He also offered to prove that the liquor in question was owned by him on and before the third day of July, 1855. This evidence was rejected on the same ground, and the defendant excepted.

Two questions of law arise on these facts and exceptions:
1st. What is the *extent* of the prohibition upon the sale of

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liquor, contained in the first section of the act, as it is qualified by the second and other sections? and, 2d. Is *that prohibition* a valid legislative act?

That part of the first section that bears upon these questions is in these words:

"Intoxicating liquors, except as hereinafter provided, shall not be sold * * * * by any person, for himself or any other person, in any place whatsoever."

Then follow divers provisions prohibiting the giving away or keeping such liquor, except in certain specified places, which provisions, as they have no bearing upon the questions above stated, require no examination. The last clause of the section is in these words:

"*This section shall not apply to liquor* the right to sell which is given by any law or treaty of the United States."

The second section provides that certain persons, on complying with its provisions, "may keep for sale, and may sell, intoxicating liquor and alcohol, for mechanical, chemical, or medicinal purposes, or wine for sacramental use."

The twenty-second section contains several provisions in relation to the construction of the act, and among others a provision that nothing in the act shall be construed so as to prevent "*the importer of foreign liquor from keeping or selling the same in the original packages, to any person authorized by this act to sell such liquor.*"

These provisions embody all the prohibitions and exceptions material to the questions under consideration contained in this act.

It will be observed, that the act contains no provisions excepting any liquor *specifically* from the operation of the prohibitory clause. The exception in the first section relates to "*liquor, the right to sell which is given by any law or treaty of the United States.*" No law or treaty of the United States has been cited, and I am not aware that any exists, *expressly* giving the right to sell any *specific* liquor. But there are divers laws and treaties providing and stipulating for the admission of foreign liquors into the United States, upon certain terms pre-

scribed by such laws and treaties. These laws and treaties were enacted and entered into in pursuance of the power conferred upon congress by the constitution of the United States, to regulate commerce with foreign nations and among the several states, and with the Indian tribes. (*Art. 1, § 8.*)

In the case of *Brown agt. The State of Maryland*, (12 *Wheat.*) it was held, by the supreme court of the United States, that an act of that state requiring importers to take out a license to sell imported merchandise, was repugnant to the provision of the constitution of the United States prohibiting the states from laying duties on imports.

Chief Justice MARSHALL, in the same case, held, that an importer of foreign merchandise, who had imported the same under the revenue laws of the United States, acquired a right under such laws to sell the imported article in the *state and condition* in which it was imported; that the law of Maryland was a regulation of foreign commerce, and, as such, was in conflict with the revenue laws of the United States.

Justice THOMPSON dissented from the position taken by the Chief Justice, and insisted upon the right of the state to levy the license tax, as a legitimate exercise both of its power of taxation and its power to regulate its own internal trade; holding that the importer acquired no right under the laws of the United States to sell the imported article independent of state regulation.

In the cases of *Pierce agt. The State of New-Hampshire*, *Thurlow agt. The State of Massachusetts*, and *Fletcher agt. The State of Rhode Island*, commonly known as the "*license cases*," (5 *How. S. C. R.*.) the question as to the right of the states to regulate and prohibit the sale of liquors, the importation of which was authorized by the laws of the United States, was brought before the same court. The statute of Massachusetts, under which one of the cases originated, made it unlawful for any person to sell intoxicating liquor, without a license, in quantities less than twenty-eight gallons. The law also contained an express provision, that the select-men, in whom the

power to grant licenses was vested, should not be *compelled to grant any licenses*.

The statute of New-Hampshire prohibited the sale of liquor in that state in *any quantity* without a license.

The law of Rhode Island contained provisions similar to those contained in the law of Massachusetts.

The defendants were indicted and convicted in the state courts for violations of these laws; and the judgments, being affirmed by the supreme courts of the states respectively, were carried by writs of error to the supreme court of the United States. In that court it was contended, on the authority of *Brown agt. Maryland*, that the laws were void, on the ground that the laws of the United States authorized the importation of the liquor sold by the defendants in those cases,—(which liquor had been actually imported,)—and that the state laws were in conflict with those of the United States. The liquor sold by the defendant in the New-Hampshire case was imported from Massachusetts; and it was contended that the law of that state was repugnant to the provision of the constitution authorizing congress to regulate commerce among the states. But the court held that the laws of the states must be construed as applying exclusively to the domestic trade in liquor; that they had no application to imported liquor in the hands of the importer; that they did not interfere with *his right* to sell in the original packages, as laid down in *Brown agt. Maryland*, and were not, for that reason, in conflict with the laws of the United States, under which the liquor was imported.

In the New-Hampshire case, it was held that the state law was a regulation of commerce "among the states," within the meaning of the constitution, and so within the power of congress; but the law was sustained on the ground that the powers of congress and the state legislature were concurrent; and that as congress had passed no law regulating commerce among the states, the state law was valid until congress passed some law conflicting with the provisions of the state law.

Chief Justice TANEY, in these cases, reiterated the doctrine laid down by Chief Justice MARSHALL in *Brown agt. Mary-*

land, and held that the right to sell imported liquor, derived from the laws of the United States, was confined to the importer, and to liquor in the casks or packages in which it was imported; and that when it passed from his hands it ceased to be *an import*, and became subject to state regulation.

It will be remembered that the law of Massachusetts prohibited sales in less quantities than twenty-eight gallons, and that the law of congress authorized the importation of the *same liquor* in quantities of fifteen gallons, and that the law could be sustained upon no other ground than that assumed by the chief justice, consistently with the rule asserted by the majority of the court in *Brown agt. Maryland*.

In the license cases, Justices DANIEL, WOODBURY, and GRIER dissented from the doctrine laid down by the chief justice, and by Chief Justice MARSHALL in *Brown agt. Maryland*, asserting the right of the importer, under the laws of the United States, to sell imported merchandise uncontrolled by state regulation. The soundness of this rule is questioned by those learned justices, and *Brown agt. Maryland* was not regarded as an *authority* for the rule.

The question was not directly involved in either case, and it may be doubted whether it is not still open to discussion upon principle. But it will be perceived that the right to sell imported liquor, given by the laws of the United States, under the broadest rule laid down by the majority of the court in the cases cited, is subject to two important qualifications: 1st. That it remains in the hands of the importer; and, 2d. That it shall be sold in the condition in which its importation is authorized, and that all sales by *other persons* or in *any other quantity or condition* than that in which it is imported, are subject, like the sales of all other property, to such regulations as may be prescribed by state laws.

The question, then, arises as to the true construction of the exception contained in the first section of the prohibitory act. The plaintiff in error contends that it extends to all *liquor in specie*, the right to sell which, under *any circumstances*, is given by the laws of the United States.

The repugnancy of this construction to the entire policy of the act, as manifested by all of its provisions, is too plain to escape observation; and if the language of the exception will fairly admit of two constructions, it should receive that which will best harmonize all of the provisions of the act. The *object* of this clause, whatever the effect of its construction may be, is rendered plain by a reference to the subject-matter to which it relates. It was assumed by the legislature that a right to sell certain liquor, was given by the laws of the United States.

We have seen that this right, considered in its utmost extent, as defined by the court whose province it is to give a construction to those laws, is neither general as to persons, nor in its application to the property to which the laws in question relate. The right, on the contrary, is limited to *certain persons*, and qualified by the *status of the property*. While it is in the hands of the importer, and in the condition in which it was imported, the laws under which he has imported give *him* a right to sell it in that *condition*. This is the *extent of the right*. When he parts with the property, or changes its condition, his right, and *all right* to sell it, derived from those laws, ceases. It is no longer liquor the right to sell *which* is given by the laws of the United States.

The object of this exception in the first section clearly was, by preserving the rights secured by the laws of the United States, to avoid collision with those laws, and the general exemption of *certain liquor in specie* from the operation of this section, which is claimed from a literal reading of the clause in question, should be controlled by the limitations as to persons, and the qualifications as to the status of the property, which are annexed to the right of sale given by the laws of the United States. So that the provisions of the first section will not apply to imported liquor while in the hands of the importer, and in the casks, bottles, or packages in which it was imported. The propriety of this construction is rendered plain by a reference to the language of the 22d section already quoted. This clause, whatever its purpose, or however unnecessarily inserted,

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may be resorted to on this question of construction as evidence of the intention of the legislature.

The second section, as we have seen, provided that certain persons, on the conditions therein prescribed, might sell liquor for certain purposes. Importers were not mentioned in this section; nor was it necessary, under any construction of section 1, according to the rule laid down in the license cases, that importers should be mentioned in section 22; but the legislature, apparently as a matter of precaution, inserted the clause last cited in that section. It refers to the same subject-matter as the last clause of section 1, and may properly be read in connection with it; and when these two clauses are read together in the light of all the provisions of the act, I think the true construction of the first section is reasonably plain. It follows that the liquor sold by the defendant was not exempted from the operation of that section. The evidence offered by him to prove that it had been imported was, therefore, immaterial, and was properly rejected.

The only remaining question is as to the validity of the prohibition. It is claimed by the defendant that the prohibition is repugnant to the provisions of the sixth section of the first article of the constitution, and therefore void. That part of the section in question, to which the prohibition is supposed to be repugnant, is in these words:—

“No person * * * shall be *deprived* of life, liberty, or *property*, without due process of law; nor shall private property be taken for public use without just compensation.”

I do not understand that it is claimed that this provision of the act violates the prohibition contained in the last clause of that part of the section above quoted. It certainly cannot be maintained that this part of the act provides for the *taking* of property in any sense of the term.

But it is claimed that this prohibition of the sale of liquor does, in *effect*, *deprive* the owner of his property in it. The argument is, that the right to sell and traffic in property is incident to, and inseparable from the title; that such right is one of the chief elements of its value; and that a law prohibiting

the exercise of this right virtually deprives the owner of his property.

That liquor is property; that the right to sell property is one of its recognized legal incidents; and that "due process of law," which the constitution prescribes as the only condition upon which the owner of property can be deprived of it, means a trial and judgment in a regular judicial proceeding, are propositions too well established to admit of argument or require the support of authority. But that the right to sell and use property at the will of the owner is absolute and subject to no restraint, cannot be maintained, and will hardly be asserted. The rights and interests of individuals are, to some extent at least, subordinate to those of the public, and must yield to them in cases of conflict.

It is the acknowledged province of legislation to prescribe, by law, such rules concerning the title to property, and its sale and use, as will, in the judgment of the legislature, most effectually secure to the owner the enjoyment of these rights on the one hand, and, on the other, protect the public from injuries that may result from the exercise of them. This power, however, is subject to the restraints imposed by the constitution, through which, in this state, the legislature derives its powers. We have, then, only to compare the provision heretofore cited, of the first section of the prohibitory act with the above provision of the constitution, and from such comparison to determine whether there is any conflict between the law and the constitution. The provision of the first section, as qualified by the second section, so far as the sale of liquor is concerned, is, in substance, that intoxicating liquor, (except for mechanical, chemical and medicinal purposes,) shall not be sold, &c.

The provision of the constitution is, that no man shall be deprived of his property without due process of law. The question is, does this prohibition *deprive* the owner of liquor of that property? It does not deprive him of the possession or use of it; but while it remains in the state, subject to the law, it undoubtedly diminishes its value; and hence it is argued, that the owner is, to that extent, virtually deprived of it.

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Substantially the same prohibition as that contained in our present constitution, has existed in all our constitutions since the organization of the state government; and under each of those constitutions laws were passed imposing restraints, to a greater or less extent, upon the sale of liquor. The validity of those laws has never, to my knowledge, been questioned. But the difference, it is urged, between those laws and the present law is, that those laws merely *regulated*, while this *prohibits* such sale.

It remains to be seen whether there is any difference in principle between the two cases, when they are regarded with reference to the objection now under consideration. The only cases cited, in which this question has been considered by this court, are those of *The People* agt. *Berberrich* and *The People* agt. *Toynbee*, decided at a general term in the second district, by Justices BROWN, STRONG and ROCKWELL.* A prosecution was commenced in each case before a magistrate, upon a charge of selling, and having with intent to sell, intoxicating liquor. Both defendants were convicted, and, in *Toynbee's* case, a fine was imposed pursuant to the statute, and a judgment of forfeiture, directing the destruction of the liquor, was rendered, from which judgment the defendant appealed to this court. *Berberrich's* case was removed by certiorari before sentence. An objection was taken before the magistrate in *Toynbee's* case to the sufficiency of the complaint, and also to the jurisdiction of the magistrate to proceed to try the case after the defendant had offered to give bail to answer to an indictment; and, as I understand the opinion of Justice BROWN, the last objection was taken in *Berberrich's* case. Justice STRONG held both objections good; and my recollection of Justice ROCKWELL's opinion (which I have not now before me) is, that he concurred with Justice STRONG as to the validity of the above objections, and concurred in the judgment *on that ground alone*. Justice BROWN held that the last objection was not well taken; but held that the first section of the law, so far as it prohibits the

* Since this opinion was written, the cases of *The People* agt. *Berberrich* and *Toynbee* have been reported, *ante* page 239.

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sale of liquor, the sections or provisions which provide for its seizure and destruction, and several other provisions, under which (as I understand the facts from the several opinions) no questions were raised in the cases, were unconstitutional.

Justice STRONG concurred in this opinion as to the unconstitutionality of the prohibitory clause of the first section, and the judgments were reversed. Both of the learned justices placed their opinions upon the ground that the prohibition of the sale of liquor was *virtually* depriving the owner of his property in it. Justice STRONG says, "The protection of any species of property must necessarily extend to its essential and definitive characteristics, *especially those which constitute its main value.*

* * * One of the essential characteristics of property is its vendibleness, especially for the principal use to which it can be appropriated. * * * That the *manner* of selling it may be *regulated* so long as the *right is essentially preserved*, there can be no doubt. * * * Upon the whole, my conclusion is, that the right of property extends not only to its *corpus*, but to its *ordinary and essential characteristics*, of which the right of sale is one, and that it can be controlled *only so far as to prevent abuse*, without destroying such characteristics."

The learned justice, speaking of our former excise laws, thus states the difference between the present statute and those laws: "They were, however, by no means *prohibitory of the right*. Every man was at liberty to sell in quantities exceeding five gallons—and a *SELECTED CLASS*, in any quantity."

In conclusion, the learned justice says, "I consider the statute in question as *mainly prohibiting* the sale of intoxicating liquor as a beverage, and destructive of its *principal value*; and with that impression I must adjudge it to be null and void to that extent."

Justice BROWN, speaking of the character of the act, says, "If its office is one of mere regulation, to prescribe *by whom*, and to whom, and at what places, liquors in certain quantities may be sold, then it does no more than the excise law, which it is thought to supersede; and although *prejudicial to existing interests*, and may subject certain classes to *some privations and*

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inconvenience, it is nevertheless a law of binding obligation, which the people must obey and the tribunals of justice enforce."

Speaking of the "written limitations" upon legislative power, contained in our state constitution, the learned justice adds, "They were intended to save absolute, inherent rights from the power of legislative acts which *interrupt their enjoyment or impair* their value. * * * There can be no property, in the legal and proper sense of the term, where neither the owner nor the person who represents the owner, has the power of the sale and disposition. That which cannot be used, enjoyed, or sold, is not property; and to take away all *or any* of these incidents is, in effect, to deprive the owner of his property."

Both of the learned justices, from whose opinions I have quoted, concede the power of the legislature to regulate the "manner of selling," and to prescribe "*by whom* liquors, in certain quantities, may be sold."

Upon what principle, consistent with this constitutional provision, if it is applicable at all to this species of legislation, can the legislature, in the language of one of the learned justices, prescribe "*by whom* liquors, in certain quantities, may be sold;" or, in the language of the other learned justice, designate a "*selected class*" to sell in such quantities, while it *prohibits* others from doing the same thing. Those who do not happen to be thus "*prescribed*"—who do not belong to the "*selected class*," and who may happen to own liquor in quantities less than those in which all are authorized to sell, would be as effectually "*deprived of their property*" under such a law, as those who own larger quantities are so deprived, by this law. It is no answer to say that such a law would affect but few persons and a limited amount of property, nor that its object is to regulate "*only so far as to prevent abuse*."

The protection of this constitutional provision, in its letter and spirit, extends in equal measure to each individual, and the aggregate population of the state, and to *all property*, whether its value is measured by mills or millions. It matters

not whether a few or many are deprived of their property, or whether the amount of which they are deprived be small or great, whether a person is deprived of an inconsiderable portion or all of his property. The constitutional prohibition is not fractional, but a unit, indivisible and absolute. It regards the *character of the act*, and not the *extent of its consequences*. If the act is prohibited, no consideration of consequences can change its character; nor can it be palliated by the purpose which prompted it, however laudable.

If, therefore, a law, which in its operation diminishes the value of property, can be regarded as *depriving* the owner of it, no law that produces that effect can be sustained. The argument under consideration, when followed to its logical consequences, will not, and cannot be satisfied with the overthrow of the law in question. Many of our police and sanitary, and all of our commercial regulations, our quarantine and usury laws, must share the same fate. Their effect upon property is the same; the difference is only in degree; and if this constitutional provision applies to any such law, it necessarily prohibits all. For the attempted distinction between the "*essential characteristics*" of property, and any of its incidents or qualities, which are regarded as elements of its value, whether they "*constitute its main value*," or only a small part of it; and between laws which "subject certain classes to *some privations*," and laws which affect all classes, and involve great privations, there is no foundation in the constitution whose protection and prohibition are general; nor, I respectfully submit, in reason, which rejects distinctions where it fails to perceive differences. The validity of such laws rests upon no restricted construction of this constitutional provision, but upon a principle of the common law, older than constitutions—coeval with the earliest civilized ideas of property. That principle is, that every man shall so use and enjoy his own as not to injure another, and especially that the use which he makes of his property shall not work a public evil.

This is another *incident* to the right of property, as *inseparable* from the title as the right of sale, or any other right of en-

joyment annexed to it. The legislature, which exercises the sovereign power of the state, is clothed with the power, and charged with the duty of promoting its prosperity, by regulating its internal commerce, and holding out suitable encouragement to the industry of its citizens, of preserving the public peace by preventing and punishing crime, and of guarding the health and morals of the people by such laws and regulations as in its judgment may seem likely to promote these objects, *subject only to the limitations prescribed by the constitution*. The powers of the legislature for these purposes, are unlimited. In the choice of the means, its discretion is plenary. If in its judgment the trade in any article is incompatible with, or dangerous to any of these objects of its protection, that trade may be regulated, restricted or *prohibited, in the discretion of the legislature*.

It is admitted that the sale may be *controlled*, but it is claimed that it can be done "*only so far as to prevent abuse*." According to this proposition, if abuse should be found to be inseparable from, or so generally attendant upon the exercise of the right as to render the permission of the one and the prevention of the other impracticable, the right to prohibit would necessarily follow. Whether abuse is so intimately connected with this traffic, is a question of fact proper for the consideration of the legislature, in the exercise of its discretion, to ascertain the necessity and determine the extent of its action. But this is an inquiry which the court cannot entertain in considering a question of power.

The foregoing positions cannot be more clearly illustrated, or more powerfully enforced, than they are in the language of Chief Justice MARSHALL in *Brown agt. Maryland*. In reply to the argument of the counsel for the state in favor of the power there claimed, to lay duties on imports, or to require importers to procure licenses from the state to sell their imports, in which it was urged that the states would not be likely to impose such terms as to discourage or diminish importation, the chief justice said,

"It is obvious, that the same power which imposes a light

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duty can impose a heavy one—one which *amounts to prohibition*. Questions of power do not depend on the degree to which it may be exercised. If it *may be exercised at all*, it must be exercised *at the will of those in whose hands it is placed*. * * * The question is, *where does the power reside?* not, *how far will it be probably abused?* The power claimed by the state is, in its nature, in conflict with that given to congress: and the greater or less extent in which it may be exercised, *does not* enter into the inquiry concerning its existence."

The law of this state, which was superseded by the act in question, was probably as favorable an illustration of the exercise of the *regulating* power as could be instanced, I understand both of the learned justices, whose opinions are above quoted, to concede the validity of its provisions; and yet a slight consideration of its practical effect will show that the alleged "absolute and inherent rights" of the owners of this property, did not escape the obnoxious effect attributed to the law in question; but that, on the contrary, it "interrupted their enjoyment and impaired their value." It prohibited all but a "selected class" from selling in less quantities than five gallons, and thus not only "interrupted," but *destroyed* the right to that extent. It circumscribed the market, and decreased the demand for the article to a certain extent, and thus "impaired its value" to the same extent.

Similar illustrations might be drawn from our quarantine and health laws, and the police and other regulations of municipal corporations. But I propose to pursue the history of legislation on this subject, and to examine briefly some of the adjudications upon the laws of other states.

By the law of Massachusetts, under which one of the "license cases" arose, all persons were prohibited from selling liquor, in quantities less than twenty-eight gallons, without a license, and the act contained a provision that the commissioners of excise should, in no case be compelled to grant a license. This law, it will be seen, exercised the power of *regulation* to an extent approaching very nearly to *practical prohibition*.

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The law of Rhode Island, under which another of these cases arose, contained a provision similar to that of the Massachusetts law, fixing the minimum quantity that might be sold without a license at ten gallons.

The law of New-Hampshire went still further, and prohibited *all sales* without a license. There was no provision in the law under which licenses, to any extent, could be procured as matter of right. The power of granting and refusing licenses was to be exercised in the discretion of the officers designated for that purpose.

It will be seen that *absolute prohibition* might result from the operation of this law. That this was the design of the law, and the effect of its operation in a great majority of cases, no one can doubt. That all of these laws contained unusually stringent restrictions upon the sale of liquor; that they seriously interrupted the enjoyment, and impaired the value of the right of sale, no one will deny; but whether the right, in the language of Justice STRONG, was even "essentially preserved" by the New-Hampshire law, might well be doubted. As was natural, these laws encountered sturdy opposition from the interests so seriously affected by them. They were subjected to the most searching judicial scrutiny, and their validity was affirmed by the supreme courts of the respective states.

The constitution of each of those states contained the same prohibition against depriving citizens of property without "due process of law," as is relied on in this case. And yet, it is a remarkable fact, that in all the discussions which these cases underwent in the state courts, this objection was not suggested. The question, as we have seen, which was argued in the supreme court of the United States was, whether those laws were in conflict with those of congress regulating commerce. The question now under consideration could not arise in that court, and for that reason the decided opinions of the chief justice and other members of the court, in favor of the right of the states to prohibit entirely the domestic traffic in liquor, cannot be regarded as authority, in the strict sense of the term, on this point. But the construction given by that court to the state

laws, (which, in their terms, comprehended *all liquors*,) limiting their application to the domestic trade, for the purpose of maintaining the validity of those laws, shows the high sense entertained by that court of the importance of preserving, in its utmost latitude, the power of the states to control, by restrictions or prohibitions, its domestic trade.

A legislative recognition of the same principle, equally significant, is found in the excise laws passed by congress in 1794 and 1813, each of which contained a proviso, that no license to sell liquor should be granted under the law, to any person who was prohibited from selling by the laws of any state.

Another instance of the exercise of this power of regulation, to the extent of *absolute prohibition*, is furnished by the embargo laws passed by congress in 1807, which prohibited all *importation and exportation to or from any foreign country*. These laws were, by their terms, unlimited as to the time of their duration, and were maintained in full force for nearly two years. It was objected to them that the constitutional power to *regulate* commerce, under which the law was passed, did not authorize congress to *destroy* commerce, as this act confessedly did. The question was raised, in the district court of the United States for the district of Massachusetts, in the case of *The United States agt. The Brigantine William*, (2 *Hall's Law Journal*, 253,) in which a libel was filed to enforce a forfeiture of the vessel, for being engaged in the exportation of merchandise in violation of those laws.

It was argued, in behalf of the claimant, that the acts of congress were utterly void; that there was not only an entire want of power in the constitution to *prohibit* commerce, but that the act was in direct violation of the grant of power to regulate, which necessarily implied the duty of preserving the thing to be regulated. The court held the law to be constitutional. DAVIS, district judge, in an elaborate opinion, examined the question in all its bearings. In discussing the questions as to the nature and extent of legislative power, and the restrictions upon it, *which could be enforced by the judiciary*, the learned judge said:

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*"Affirmative provisions and express restrictions contained in the constitution are sufficiently definite to render decisions, probably in all cases, satisfactory; and the interference of the judiciary with the legislature, to use the language of the constitution, would be reduced to 'cases' easily to be understood, and in which the superior commanding will of the people, who established the instrument, would be clearly and peremptorily expressed. To extend the censorial power further, and especially to extend it to the degree contended for in the objections under consideration, would be found extremely difficult, if not impracticable in execution. To determine where the legitimate exercise of discretion ends and usurpation begins, would be a task most delicate and arduous. Before a court can determine whether a given act of congress, bearing relation to a power with which it is vested, be a legitimate exercise of that power or transcends it, the degree of legislative discretion admissible in the case must first be determined. Legal discretion is limited. * * * Political discretion has a far wider range. It embraces, combines and considers all circumstances, events and projects, foreign or domestic, that can affect the national interest. Legal discretion has not the means of ascertaining the ground on which political discretion may have proceeded. It seems admitted that necessity might justify the acts in question. But how shall legal discussion determine that political discretion, surveying the vast concerns committed to its trust, and the movements of conflicting nations, has not perceived such necessity."*

Speaking of the objects for which this power may be exercised, the learned judge said,—

"The mode of its management is a consideration of great delicacy and importance; but the national right or power, under the constitution, to adapt regulations of commerce to other purposes than the mere advancement of commerce, appears to me unquestionable."

• The late Justice STORY, in commenting upon this provision of the constitution, and in the same connection, upon the em-

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bargo laws, and the question involved in the case just cited, says,—

“No one can reasonably doubt that the laying of an embargo, suspending commerce for a limited period, is within the scope of the constitution. But the question of difficulty was, whether congress, under the power to *regulate* commerce with foreign nations, could constitutionally suspend and *interdict it wholly for an unlimited period*; that is, by a permanent act, having no limitation as to duration, either of the act or of the embargo.

* * * An appeal was made to the judiciary upon the question; and it having been settled to be constitutional, the decision was acquiesced in, though the measure bore with almost unexampled severity upon the Eastern States; and its *ruinous effects* can still be traced along their extensive seaboard. * *

* Non-intercourse and embargo laws are within the range of legislative discretion; and if congress have the power, for purposes of safety, of preparation or counteraction, to *suspend* commercial intercourse with foreign nations, they are not limited as to *duration* any more than as to the manner and extent of the measure.”

The effect of these laws upon private property was far more extensive and destructive than any that can possibly result from the law in question. The right to export property, designed and valuable only for that purpose, was one of those “essential and definitive characteristics which constituted its main value.” The prohibition was “*destructive of its principal value*,” and property of the value of many millions was rendered worthless by their operation.

The constitution of the United States contains the same restrictions upon the legislative power of congress that is imposed by the constitution of our state upon its legislature, that no man shall be deprived of his property without due process of law. But in all the opposition which the embargo laws encountered, the objection that they violated this provision of the constitution, occurred to none of its astute and able opponents.

The case of the *William* is a direct *authority* for the proposition, that the national government, under the constitutional

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grant of power to regulate commerce, may restrict it *in its discretion*, that such restriction may be carried to the extent of absolute *prohibition*; and that this power is not restricted to measures exclusively beneficial to commerce, but that it may be exercised as an instrument for other purposes of general policy and interest. These propositions may, in my opinion, be rested with equal safety upon the *authority* of this case, and the conclusive *reasoning* by which it is sustained. The powers of congress are *enumerated* in the constitution, and are expressly restricted to those so enumerated.

The power in question is limited to commerce with foreign nations and among the states. That the same power over internal commerce is reserved in all its amplitude by the several states, is not questioned; and that a state by virtue of its powers of original sovereignty which are merely *limited* by specific restrictions, and not *enumerated* in its constitution, may, in the absence of such restrictions, exercise the same control over its domestic commerce, as that exercised by congress over foreign commerce, and for the same purposes, cannot be doubted.

In view of this long-continued and uniform course of legislation, based upon the concurring authority of the general government and the several states, sanctioned by general acquiescence and vindicated by judicial authority whenever questioned, accompanied as such legislation has uniformly been by cotemporaneous constitutional restrictions identical with the restriction now invoked against this law, the question as to a conflict between the law, in the respect now under consideration, and the constitution, must be regarded as settled.

The prohibition in question, as I have remarked, does not affect the possession of the property. It does not interfere with the right of sale except within the state; and notwithstanding the prohibition, those interested in this property may manufacture and export it for sale elsewhere. I say, notwithstanding *this* prohibition; I am aware that there are provisions in the act which were, perhaps, designed, and which may possibly be construed to prevent this.

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The provision that it shall not be *kept* in any place except a dwelling-house or church, has been cited, with others supposed to evince a destructive purpose towards this property, and which are alleged to be plainly repugnant to the constitutional rights of the citizen. But the defendant has not been prosecuted, nor has his property been proceeded against under these provisions. When he is indicted for *keeping* liquor in violation of the act, or proceedings are instituted to enforce a forfeiture of his liquor for any such cause, different questions will be presented. With those questions we have nothing to do in this case. When they are legally presented for our consideration, the parties interested in them will be entitled to the deliberate and unbiased judgment of the court upon them. But to secure this, it is not only proper but indispensable that the parties interested, instead of the court, should be first heard.

The legislature have said, that the defendant shall not sell intoxicating liquor in this state. He has chosen to disregard that injunction, and has been convicted of an offence against the law. He disputes the right of the legislature to pass the law, and this question, and the question of construction, we are called upon to decide—nothing more.

With the questions as to the wisdom, policy and propriety of the law, which were discussed with so much zeal by the defendant's counsel at the bar, we have nothing to do. Those are questions addressed exclusively to the discretion of the legislature.

This is a mere question of power. If the power which the legislature has assumed to exercise exists, and the law is plain, the duty of the judge and the citizen is the same—that of simple obedience. To both alike it speaks the language of command and not of persuasion.

I know of no principle recognized by the constitution, or resulting from any sound theory of government, which requires or authorizes the judiciary to interpose between the legislature and the people, to shield the latter from the consequences of an improvident or capricious use, or even a positive abuse of legislative power. The remedy for such abuses, if they exist,

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is in other hands. It rests with the people, who, in their constitution, have established the only restrictions upon legislative power that can be judicially recognized, or practically enforced, except by those in whom the ultimate power of sovereignty resides.

The judgment of the court of sessions should be affirmed.

SUPREME COURT.

THE PEOPLE, *ex rel.*, EZRA B. BOOTH, respondent, agt. JOHN FISHER, appellant.

The fifth section of the act of the 9th of April, 1855, entitled "An Act for the Prevention of Intemperance, Pauperism and Crime," requires the magistrates therein named to hold courts of special sessions for the trial of offences arising under the provisions of said act, and to proceed to the trial thereof as soon as the complainant can be notified. Neither this power or duty is made to depend upon the defendant's request to be tried, his omission to give bail, or any other condition. The defendant is *not*, therefore, entitled to be discharged upon tendering sufficient bail for his appearance at the next court having cognizance of the offence.

These provisions are *not* in conflict with § 2 of Art. 1 of the constitution, which declares that "the trial by jury, in all cases in which it has heretofore been used, shall remain inviolate forever." (*See the case of Tynbee, ante page 289, adverse.*)

A common-law jury trial can only be had in a court of common-law jurisdiction, both as regards the character of the court and its mode of procedure. It means such a trial as is contemplated by § 6 of Art. 1 of the constitution, for persons charged with capital or otherwise infamous offences, which must be upon presentment or indictment of a grand jury, and in a court of record with common-law jurisdiction.

If an act is made criminal, but not felonious or infamous, by a statute passed after the adoption of the constitution, the constitutional privilege does not apply, and the right of trial by jury is not secured in such a case.

Monroe General Term, Dec., 1855.

Before SELDEN, JOHNSON and WELLES, Justices.

CERTIORARI to the county judge of Monroe county.

On the 9th of August, 1855, the appellant was brought be-

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fore S. D. W. Moore, Esq., police justice of the city of Rochester, upon a warrant issued by said justice, charged with a violation of the act entitled "*An Act for the Prevention of Intemperance, Pauperism and Crime*," passed April 9th, 1855. On being brought before the justice, he offered to give bail for his appearance at the next criminal court having cognizance of the offence. The justice was satisfied with the responsibility of the bail so offered, but refused to receive it or to take any bail. Thereupon, on the 11th day of August, 1855, the appellant presented his petition to H. Humphrey, Esq., county judge, &c., and obtained the allowance of a writ of *habeas corpus*, in order to be let to bail and be discharged from custody. On the same day, the officer made a return to said writ, and the same was traversed by the affidavit of the appellant, and issue was joined thereon.

On this issue, evidence was taken to contradict the return. After hearing the case and arguments of counsel, the county judge decided not to let the defendant to bail, and ordered him remanded into the custody of the police constable, to be tried before a court of special sessions.

On the 17th day of August, 1855, the defendant sued out a writ of *certiorari*, removing the proceedings and adjudication of the county judge into this court, to be reviewed.

HENRY HUNTER, *for defendant.*

J. D. STEBBINS, *for The People.*

By the court—WELLES, Justice. The fifth section of the act entitled "*An Act to Prevent Intemperance, Pauperism and Crime*," passed April 9th, 1855, is in the following words:—

"§ 5. Every justice of the peace, police justice, county judge, city judge, and, in addition, in the city of New-York, the recorder, each justice of the marine court, and the justices of the district courts, and in all cities where there is a recorder's court, the recorder shall have power to issue process, to hear and determine charges, and punish for all offences arising under any of the provisions of this act; and they are each hereby

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authorized and required to hold courts of special sessions for the trial of such offences, and under this act to do all other acts and exercise the same authority that may be done or exercised by justices of the peace in criminal cases, and by courts of special sessions, as the same are now constituted; and the term magistrate, as used in this act, shall be deemed to refer to and include each officer named in this section:—such court of special sessions shall not be required to take the examination of any person brought before it upon charge of an offence under this act, but shall proceed to trial as soon thereafter as the complainant can be notified; and, for good cause shown, he may adjourn from time to time not exceeding twenty days. At the time of joining issue, and not after, either party may demand a trial by jury, in which case the magistrate shall issue a venire, and cause a jury to be summoned and empaneled, as in other criminal cases in courts of special sessions. The complainant may appear upon such trial upon behalf of the people, and prosecute the same with or without counsel. He may also prosecute the same in all the courts to which, as hereinafter provided, appeal may be taken, by attorney; or he may apply to the district attorney, whose duty it shall be, upon such application, to appear and conduct said appeal from the judgment thereon. The same costs and disbursements shall be allowed against the defendant upon such appeal as are now allowed in civil actions, in those courts to which appeal may be taken according to the provisions of this act. In all cases, if the district attorney shall appear and conduct the trial or appeal, or both, the costs, if any, shall go to him for his individual use—in other cases to the complainant; and in default of the payment of the whole, or any part thereof, the defendant may be committed to the same extent as provided in the fourth section of this act.”

By this section the several officers therein enumerated are invested with the same powers, in relation to offences under the act of which it constitutes a part, with which justices of the peace are clothed in criminal cases; and are each required to hold courts of special sessions for the trial of offences under

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the same act, with the same powers, in reference to such offences, as courts of special sessions, possessed as they were constituted when the act was passed, in reference to cases within their jurisdiction.

By the Revised Statutes, the powers of courts of special sessions are confined to cases where the party charged with an offence requests to be tried before them, or, where he shall not so request, but shall after being so required, omit for twenty-four hours to give bail for his appearance at the next criminal court having jurisdiction, &c. (2 R. S. 711, §§ 2 and 3.)

But the section of the prohibitory act referred to does not, as the Revised Statutes do, restrict the power of the courts of special sessions to cases where the party charged either requests to be tried by such court, or omits to give bail. It certainly does not do so in terms, nor, as I think, by just or fair implication; but, on the contrary, it seems to contemplate that the justice, or other officer before whom the person charged shall be brought by virtue of the process, shall proceed at once to the trial of the charge.

Power is expressly conferred upon the officers mentioned to issue process, to hear and determine charges, and punish all offences against the provisions of the act; and for that purpose they are each authorized *and required* to hold courts of special sessions for the trial of such offences; such court is not required to take the examination of any person brought before it upon charge of an offence, *but shall proceed to trial as soon thereafter as the complainant can be notified.*

The section then proceeds to give directions respecting adjournments, and provides for a jury on the demand of either party, if applied for at the joining of issue. It then concludes with some regulations and provisions respecting appeals from judgments of the courts of special sessions, provided for in the eighth section of the act, and the costs in such appeals. It will be perceived, not only that the magistrate has conferred upon him the power to try the person charged, but that he is imperatively required to hold a court of special sessions, and proceed to the trial as soon as the complainant can be notified.

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Neither his power or duty to try is made to depend upon the defendant's request to be tried, his omission to give bail, or any other condition.

That the power of courts of special sessions, in the cases provided for in the Revised Statutes, is thus limited and dependent, and in the act under consideration, acts, which, before its passage, were innocent in the eye of the law, are made misdemeanors, their punishment defined, these tribunals erected and provided expressly for their trial and punishment, with directions concerning their manner of proceeding, and no mention made of any such condition or restriction of their powers, is strong evidence to my mind that none such were intended to be imposed. Instead of the conditions provided in the Revised Statutes, these courts, in cases arising under this act, are directed to proceed at once to the trial of the persons charged with violations of its provisions.

It is contended, however, in behalf of the appellant, that if the intention of the act was to compel the person arrested by virtue of process issued by a magistrate, to be tried before a court of special sessions, without the right on his part to be released from custody upon giving bail to appear at the sessions, the act is so far in contravention of § 2 of Art. 1 of the constitution, which declares that, "The trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever."

I entertain no doubt, that by the words "trial by jury," as there mentioned, was intended a common-law jury, which consists of twelve men. But I am satisfied it was not intended to apply to a case like the present.

Section 6 of the same article, provides that "no person shall be held to answer for a capital or otherwise infamous crime, (except in cases of impeachment, and in cases of militia when in actual service, and the land and naval forces in time of war, or which the state may keep, with the consent of congress, in time of peace; and in cases of petit larceny under the regulation of the legislature,) unless on presentment or indictment of a grand jury," &c.

The framers of the constitution have here declared that persons charged with capital or otherwise infamous crimes, shall not, with certain exceptions, be held to answer therefor, except by indictment or presentment of a grand jury; clearly, as it seems to me, leaving all other cases under the regulation of the legislature.

Persons charged with crimes not capital or otherwise infamous, may, therefore, be held to answer without being first indicted or presented by a grand jury, as the legislature shall provide.

But it is said, that in whatever court the person charged may be tried, and whether with or without being first presented by a grand jury, he is, in any event, entitled to have his guilt or innocence determined by a jury of twelve men.

The several written constitutions of this state—those of 1777, of 1821, and of 1846—contain substantially the same provisions as those above referred to.

By § 4 of the act declaring the powers and duties of justices of the peace, passed April 13th, 1813, (2 R. L. 507,) petit larceny, misdemeanor, breach of the peace, or other criminal offence under the degree of grand larceny, was triable by a court of special sessions, and *that* without any jury whatever. This continued until 1824, when the legislature so far modified it, as to give the party accused the right to be tried by a jury of six men. (*Laws of 1824, ch. 238, § 47.*)

By the Revised Statutes, the cases triable by courts of special sessions are mentioned, and are contained in eight specifications, all being below the degree of grand larceny, and none of them being what would be denominated infamous, in the sense of the constitution, except petit larceny. (2 R. S. 711, § 1.)

The section of the constitution, which, it is claimed, secures to the appellant a trial by a jury of twelve men, uses the expression, "*the trial by jury.*" This refers as well to all other incidents of the trial as to the number of men necessary to constitute the jury. It means, as I think, such a trial as is contemplated by § 6, for persons charged with capital or otherwise infamous offences, which must be upon presentment or indict-

ment of a grand jury, and in a court of record with common-law jurisdiction.

I think this is apparent from several considerations:—

1. A common-law jury trial can only be had in a court of common-law jurisdiction, both as regards the character of the court and its mode of procedure. It is not true, that simply making the jury to consist of twelve men, constitutes a common-law jury trial.

2. Section 6 excepts from its operation petit larceny, which at common law was felony, and was infamous in its character. The statute of 1813, and the Revised Statutes referred to, expressly authorized courts of special sessions to try for that offence, which was never held to be in contravention of the constitution. (*Murphy agt. The People*, 2 Cow. R. 815; *The People agt. Goodwin*, 5 Wend. R. 251.)

3. The 2d and 6th sections referred to, are parts of the same article of the constitution, and are *in pari materia*; the latter, securing to all persons charged with infamous crimes, excepting as aforesaid, a trial, after due presentment or indictment by a grand jury, leaving the trial of all cases of misdemeanor on the footing of petit larceny, to be provided for by the legislature by a jury of six, twelve, or any other number, or without a jury.

4. No jury trial in criminal cases was ever known to the common law, but such as followed upon indictment in a common-law court, after the accused was in custody, had been arraigned and had pleaded to the indictment.

5. This construction makes the two sections harmonious and sensible. The legislature may declare criminal, acts which before were innocent, as in case of the statute under consideration. How can it be said, that in such cases a jury trial has been "*heretofore used*?" Section two is expressly limited to cases in which the trial by jury *has been heretofore used*. In cases of acts made criminal by a statute passed after the adoption of the constitution, no trial either with or without a jury has been used. But if an act is made a felony by statute, and thereby becomes infamous in its character, as in the cases of

the statutes to prevent abduction of females for purposes of prostitution, and to prevent seduction, section six secures to the persons charged with its violation a trial by jury, after due presentment by a grand jury.

6. Section two only requires a trial by jury in cases where it has been heretofore used. This cannot mean cases where it might or might not be required, for then no misdemeanor could be tried by the special sessions, as every person charged with any crime was liable to be indicted therefor by the grand jury, and then a trial by jury was the only one which could follow. The only practicable interpretation is to exclude from its operation those cases where it was competent to try by a court of special sessions, and where such trials had been in use. By the revised laws of 1813, before cited, all offences under the degree of grand larceny might be tried in those courts, and that law continued in force until 1830, when the Revised Statutes limited the jurisdiction of courts of special sessions to certain specified cases. The constitution has been twice revised since 1813, and the provisions on the subject have been continued substantially the same as they were before 1813. It would be singular, not to say absurd, if the organic law is to vary in its principles, and the objects to which it relates, at every or any change of legislation. It should be interpreted, in this respect, in the same way as if there had been no revision since 1777. The fact that the same thing has been twice asserted since that time, in the same solemn manner, certainly ought not to change the interpretation justly applicable to it originally, but on the contrary should confirm such interpretation.

For the foregoing reasons, I am of the opinion that the decision of the county judge was correct, and should be affirmed.

SELDEN and JOHNSON, Justices, concurred.

Ordered accordingly.

SUPREME COURT.

LUTHER W. BADGER agt. JOHN C. WAGSTAFF.

Where an application for an injunction is made upon the complaint under the first clause of § 219 of the Code, and an *affidavit* in corroboration of the complaint is used, which states more than the complaint, it does not lessen the efficacy of the facts stated in the complaint, or transfer the application made upon the complaint to an application made upon affidavit.

New-York Special Term, Nov., 1854.

MOTION for injunction upon complaint and affidavit.

— — — — — *for motion.*
— — — — — *opposed.*

MORRIS, Justice. The complaint avers sufficient consideration for defendant's promise to give to plaintiff his note for \$5,391.50, to be endorsed by J. H. Richards; and in case Richards would not endorse it, then defendant to assign to plaintiff, as collateral security for the payment of the note, defendant's interest in \$10,000 capital stock in a certain manufacturing company.

Also avers Richards' refusal to endorse the note, and defendant's refusal to assign the interest in the capital stock.

Plaintiff, in his complaint, asks an injunction to prevent defendant selling or disposing of his said interest, and demands judgment that he assign to plaintiff his said interest in accordance with his agreement. The plaintiff swears to his complaint, and also makes a separate affidavit, in which he states the same facts contained in his complaint, with the additional fact that the defendant has threatened to sell his interest in said manufacturing company.

This application for an injunction is upon the complaint; and the affidavit is only in corroboration of the complaint.

That the affidavit states more than the complaint, does not

In the Matter of Pond, &c. agt. Wood, Mayor, &c.

lessen the efficacy of the facts stated in the complaint, or transfer the application made upon the complaint, to an application made upon affidavit.

This application is upon the complaint under the first clause of section 219 of the Code, and entitles the plaintiff to his injunction.

Motion for injunction granted, with \$5 costs, without prejudice to defendant renewing motion upon answer, or answer and affidavits.

SUPREME COURT.

In the Matter of the Petition of LOYAL S. POND for a Writ of *Mandamus*, to be directed to FERNANDO WOOD, Mayor, &c.

A *mandamus* should not issue, except when it is necessary to enforce the rights of the party seeking its aid, and in that class of cases only, where no other adequate remedy exists.

The powers of another tribunal should not be invoked, unless the court having original jurisdiction should, from want of proper authority, be unable to enforce its own orders or decrees.

If an order made by the superior court, directing the comptroller to procure a warrant to be countersigned by the mayor, was one which the mayor himself was bound to obey, such order can be promptly enforced by the superior court, or the justice by whom it was made.

A *mandamus* by this court to compel obedience to such order, would be altogether improper.

New-York Special Term, Aug., 1855.

APPLICATION by Loyal S. Pond for a *mandamus*, &c.

— — — — — for application.

— — — — — opposed.

COWLES, Justice. The writ of *mandamus* should not issue except when it is necessary to enforce the rights of the party

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seeking its aid, and in that class of cases only, where no other adequate remedy exists.

In this case it is unnecessary to inquire whether the order made by the superior court, directing the comptroller to procure the warrant to be countersigned by the mayor, was one which the mayor himself was bound to obey; nor is it necessary to determine whether an order could properly be made for the payment of moneys due by the corporation of this city, until such corporation had itself been made a party to the proceeding. All of those questions the superior court, which made the order, can determine for itself, whenever that question shall arise before that tribunal.

It is sufficient for all the purposes of this motion to say, that that court possesses ample power, by process of attachment, to enforce its own orders. That remedy is open to the relator here, provided the order made by the superior court is one which the mayor was bound to obey. In such case the remedy of the relator is simple, direct, and effective; and being so, the most proper form in which to enforce the rights of the applicant, is the one in which his proceedings have been initiated. The powers of another tribunal should not be invoked, unless the court having original jurisdiction should, from want of proper authority, be unable to enforce its own orders or decrees. Even if this order is to be regarded as the order of the judge at chambers, and not that of the superior court, yet by § 302 of the Code, the judge is vested with full and ample authority to enforce obedience, if obedience is the duty of the mayor.

If, on the other hand, as the respondent contends, the order itself is not binding—a question I leave to be solved by the superior court—then, manifestly, no writ of mandamus should issue from this court.

I base a denial of the motion upon the single ground, that the order, if binding upon the mayor, can be promptly enforced by the court, or judge by whom it was made.

The motion must be denied, with \$10 costs.

Campbell agt. Shields.

SUPREME COURT.

JAMES CAMPBELL agt. ROBERT SHIELDS.

Where a landlord wilfully evicts his tenant from part of the demised premises, he can recover no rent subsequently accruing, although the tenant remains in possession during all the rest of the lease.

But if the landlord only commits a trespass on the premises, and does not evict by taking possession, or permitting a nuisance, &c., the tenant is left to his action for the trespass, and must continue to pay the rent.

New-York Special Term, Nov., 1855.

MOTION by defendant to dissolve injunction. The facts sufficiently appear in the opinion.

— — — — — *for motion,*
— — — — — *opposed.*

MITCHELL, Justice. The plaintiff is the assignee of the lease of a house and lot of land, No. 512 Greenwich-street, and the defendant the landlord.

Where the landlord wilfully evicts his tenant from part of the demised premises, he can recover no rent subsequently accruing, although the tenant remains in possession during all the rest of the lease. This is sufficiently severe, and is not to be extended. But if the landlord only commits a trespass on the lands, (and does not evict either by actually taking possession of part of the land, and depriving the tenant of it, or by what is called a moral eviction—rendering the place unfit for the tenant to occupy, as by introducing women of ill fame into other parts of the house,) the tenant is left to his action for the trespass, and must continue to pay the rent.

If this complaint be carefully examined to find the facts alleged, as distinct from conclusions, it will be found to set up only a trespass; and, in connection with the answer, this becomes very clear.

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The answer states, that about October, 1854, the owner of the adjoining lot, having commenced to tear down the building thereon, gave notice to the defendant to protect his building—the house in question; and that to uphold this building while the other was being torn down, the defendant, with the consent of the plaintiff and of the lessee, entered on the premises and repaired; and that the repairs were absolutely necessary to uphold and preserve the house; and that in consideration of the inconvenience the lessee was put to, he was, by consent, excused from paying the rent due 1st Nov., 1854.

The complaint is, that the defendant evicted the plaintiff from a portion of the house and lot—(and then states the eviction)—taking out the whole side of the house, and making the *inclosure* of the *house* and *rooms* considerably less than they were before; and that he contracted the rear of the premises several inches—(and then states the contraction)—taking away a part of the stairs, and leaving them in that condition, and left the chimneys, for a *length of time*, and the house *open*—having torn down the chimneys—and authorized the neighbor to run a nuisance into these premises.

The landlord then being warned to protect his house, and being bound to do so, did take down the whole side of the house, that being necessary, and repaired it again; he also took down the chimneys and stairway, and left the chimneys down for some time, and the house open during these repairs; and narrowed the stairway in the rear several inches; and in making his new side-wall, narrowed the *inclosure*—that is, the rooms. If this were done wrongfully, it was no eviction; it left the tenant in possession of the whole of the demised premises; and if wrongful, it was a trespass for which the landlord must pay damages, but still the tenant must pay the rent.

If the defendant's answer is correct, and it is the most probable, he did nothing unlawful in all this: he was obliged to take down and repair the side-wall, and did no damage except what was necessary for this purpose. If the side-wall is thicker than before, that was with a view to greater strength and security; and if the house is a frame house, the fire-laws

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required the new wall to be of brick, and that would necessarily widen the wall and narrow the rooms. If, as the plaintiff suggests, the defendant built the new wall inside of the old boundary, on the allegation of the neighbor, that the old encroached on the neighbor's line, then, if the allegation of title were true, the landlord did no more than the law would compel him to do, and yielded to a paramount title, and the plaintiff can only claim a small reduction of rent. If the landlord were mistaken as to the true boundary, and yielded under that mistake, that is not the wilful eviction for which he is to be punished, in being deprived of rent during the residue of the term.

The allowance of the nuisance, as it is called, is not an eviction; it is at most a trespass.

The injunction granted is dissolved, with \$10 costs.

SUPREME COURT.

MARTIN agt. KANOUSE.

A judgment in favor of a party, whether for costs only, or for damages and costs, *prima facie*, belongs to him. And in order to change this *prima facie* conclusion of law, a third person in pleading that the judgment belongs to him—it being for costs of the attorney, or for any other reason—must state definitely and certain how and in what manner he is entitled to it.

To make a pleading definite and certain, the remedy is by *motion*, not by *demurrer*.

New-York General Term, Dec., 1855.

THIS is an appeal from an order of the special term, pronouncing the defendant's answer frivolous.

It appears that Oothers & Blucher obtained a judgment against Kanouse, Blucher died, and Oothers, as the surviving partner, assigned the judgment to the plaintiff. Kanouse also

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recovered a judgment against the plaintiff, and the object of this action was to set off one judgment against the other. The question in this case is, whether the attorney for Kanouse had such a lien for the costs recovered in the suit between Kanouse and the plaintiff, that the plaintiff cannot set off the judgment which he now holds to the one which stands in Kanouse's name against the plaintiff.

The answer of the defendant alleges that the judgment in favor of Kanouse is for costs only, no part of which ever belonged to the defendant, but belonged to Garr, as his attorney in these suits, and that the defendant is not the beneficial owner of the judgment recovered in his favor.

JOHN M. MARTIN, *for motion.*

A. S. GARR, *opposed.*

By the court—MITCHELL, Justice. *Prima facie*, a judgment in favor of a party, belongs to him, whether it be for costs alone, or for debt, or damages and costs; and it might follow under a rigid system of pleading, that this *prima facie* conclusion must continue until the pleader should show how and by what means a transfer of this right was made, so as to justify a different conclusion. Under such a system the answer would be frivolous, because it does not show facts sufficient to change the *prima facie* conclusion of law.

The real fault in this kind of pleading is, that it is not as definite and certain as it should be, and for that imperfection the supreme court in this district has held the only remedy to be that pointed out by the Code—a motion to make it more definite and certain. The proper course will be to reverse the order of the special term without costs, and leave the plaintiff to move that the answer be made more definite and certain, and that the defendant should show how and in what manner, and for what reason, the costs now belong to the defendant's attorney; whether it was by virtue of the attorney's lien for costs, or by virtue of any special agreement between the defendant

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and his attorney; and if the last, what this agreement was, and when it was made, whether by parol or in writing.

When the pleadings shall be corrected in these respects, the court must suggest to both parties that it will be their interest to allow the cause to proceed to trial without continual motions.

SUPREME COURT.

GEORGE W. BRAINARD, respondent, agt. MILES JONES and
JOHN S. PROVOST, appellant.

An *objection* to a complaint for the non-joinder of parties, cannot be taken by *special demurrer*, unless the complaint shows that the party for whose non-joinder the demurrer is interposed, was living when the suit was commenced. It is not enough that the complaint is silent on the subject, the fact must appear *affirmatively*.

Where the fact does not appear on the face of the complaint, the objection should be taken by *answer*, analogous to a former plea in abatement.

Under the 120th section of the Code, *all or any* of the parties, severally liable upon a *bond*, may be included in the same action. That is, the section applies as well to *bonds* as to bills of exchange and promissory notes.

Niagara General Term, Sept., 1855.

Present, BOWEN, P. J., MULLETT and GREENE, Justices.

APPEAL from an order at special term overruling a demurrer to the complaint.

CHARLES DANIELS, *for appellant*.

D. F. CLARK, *for respondent*.

By the court—GREENE, Justice. The complaint is on a replevin bond, executed (under the old system) by one Alexander Ramsdell, as principal, and the defendants as sureties. The agreement of the obligors is joint and several. Ramsdell is not joined as a defendant in the action, and the defendant

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Jones demurs for a defect of parties: first, on the ground that Ramsdell is not made a party; and, secondly, that he, Jones, is improperly joined as a defendant with Provost.

At common law, the defendants could not be sued jointly without joining Ramsdell, provided he was living at the time of the commencement of the action. But the remedy of the defendants, when so sued; was a plea in abatement, in which it was necessary to aver that the obligor, whose non-joinder was pleaded, was then living. No case has been cited where a demurrer for non-joinder has been sustained, unless this fact was affirmatively shown by the declaration, with as much certainty as was required in an averment of the same fact in a plea in abatement. Until the fact appears clearly on the record, no case is made for abating the suit. (1 *Saund.* 291, and notes.)

The *dictum* of the CHANCELLOR, in the case of *Burgess* agt. *Abbott*, (6 *Hill*, 141,) that the objection might be taken by *special demurrer*, although it did not appear from the declaration that the party was living, was not called for by the facts of the case, and seems to be opposed to the *authority* of the case of the *State of Indiana* agt. *Worham*, (*id.* 88,) where, as I understand the opinion of Justice BRONSON, the objection was taken by special demurrer. But it is sufficient that no authority is to be found in *favor* of the rule suggested by the CHANCELLOR, when no substantial reason is urged requiring its adoption. The 144th section of the Code, lays down the same rule that prevailed at common law. It provides that the defendant may demur to the complaint "*when it shall appear upon the face thereof*" that there is a defect of parties. This does not appear unless the complaint shows that the party for whose non-joinder the demurrer is interposed, was living when the suit was commenced. It is not enough that the complaint is silent on the subject. The fact must *appear* affirmatively.

Another conclusive answer to this objection is found in the 120th section of the Code, which provides that, "persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may, *all*

or any of them, be included in the same action, at the option of the plaintiff."

It is argued by the defendants that this section was *intended* to apply to actions on bills of exchange and promissory notes only, and the explanatory note of the commissioners is cited in support of this construction. The note is in these words, "conformable to the present statute authorizing suits against the different parties to bills of exchange and promissory notes." (*Laws of 1832, ch. 276.*)

This statute referred to suits on bills of exchange and promissory notes *specifically*, and to nothing else; and so far as the 120th section relates to those instruments, its provisions are "conformable" to those of the statute in question; and the note above cited is well enough as a declaration of that simple fact. But if it is to be regarded as the opinion of the commissioners as to the *effect* of the section to which it is appended, it lacks the important element of authority, which the section has derived from the sanction of the legislature; and we must still look to what the legislature have *said* as the primary evidence of what they *meant*. The language of the section must be received in its ordinary sense, in which the legislature is presumed to have used it; and when it is plain and unequivocal, there is no room for construction. The language is, "persons severally liable on the same *obligation or instrument*," may all or any of them be joined at the option of the plaintiff.

It would be difficult to select language more comprehensive than this, or more plainly indicating parties to *every* agreement or undertaking upon which a party may become liable to an action; and it would be a forced and unnatural construction to hold that the subsequent superfluous words "*including parties to bills of exchange,*" &c., *excluded parties to every other obligation or instrument.*" (See the opinion of WILLARD, J., in the case of *De Ridder agt. Schermerhorn*, 10 Barb. 688.)

The order must be affirmed, with costs.

SUPREME COURT.

LESTER D. HIBBARD agt. THEODOTUS BURWELL.

An appeal from an order sustaining or overruling a demurrer, under § 349 of the Code, does not operate, *per se*, a stay of proceedings. (*This agrees with Story* agt. *Duffy*, 8 *How. Prac. Rep.* 488; and *Bacon* agt. *Reading*, 1 *Duer*, 622; and is adverse to *Emerson* agt. *Burney*, 6 *How. Pr. R.* 32; and the *Trustees, &c.*, *Penn Yan* agt. *Forbes*, 8 *id.* 285.)

Erie Special Term, March, 1855.

THIS action was brought for the recovery of specific personal property. The complaint was demurred to by the defendant; and after a hearing at special term, the demurrer was overruled, but liberty was given to the defendant to withdraw the demurrer and answer the complaint in twenty days, on payment of costs. The defendant did not answer within the twenty days, but within thirty days appealed from the order overruling the demurrer, under § 349 of the Code, and gave an undertaking pursuant to § 384. The appeal is yet pending.

The plaintiff now moves for a writ of inquiry, to assess his damages for the detention of the property. The defendant opposes the motion, insisting that the appeal operates as a stay of proceedings.

J. S. TORRENCE, *for motion.*

T. BURWELL, *opposed.*

BOWEN, Justice. In *Emerson* agt. *Burney*, (6 *How. Pr. Rep.* 82,) it was held by Mr. Justice WELLES, at special term, that an appeal from an order under § 349 of the Code, operated as a stay of proceedings in the cause, without any undertaking being given. The same thing, in effect, was held by the same learned justice at special term, in the *Trustees, &c.*, of *Penn Yan* agt. *Forbes*, (8 *How. Pr. R.* 285.)

It appears, by a note appended to the last case, that the de-

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cision was affirmed on appeal to the general term in the seventh district.

On the contrary, Mr. Justice MITCHELL held, at special term, in *Story agt. Duffy*, (8 *How. Pr. R.* 488,) that the proceedings in a cause were not stayed by such an appeal. The same thing was held by Justice OAKLEY, in the supreme court of the city of New-York, with the concurrence of his associates, in *Bacon agt. Reading*, (1 *Duer's Rep.* 622.)

These are all the reported cases I have found where the question submitted in this case has been under consideration, or at least where it has been passed upon. It is conceded that the Code nowhere provides that such an appeal shall stay the proceedings.

Mr. Justice WELLES, in his opinion in the case first cited, says, "The review by appeal is substituted for a writ of error in the cases where formerly a writ of error would lie, and by the common law a writ of error suspended the proceedings upon the judgment upon which it was brought, in all cases. I think the intention of the legislature was, that an appeal should, in all cases, have the same effect upon the judgment or order appealed from, excepting where otherwise provided."

But it is suggested that a writ of error could only be brought upon a judgment, or a final determination or award in the nature of a judgment; (12 *Johns.* 31; 19 *id.* 247;) and at common law the writ removed, or was supposed to remove, into the court in which it was returnable, the record itself, except where error in fact was complained of, when, if the judgment was in the supreme court, the writ was returnable in the court which rendered the judgment. (3 *Johns.* 443.)

If resort is to be had to the practice of the courts prior to the Code, to determine the effect of an appeal upon the proceedings in the cause, in the cases where the Code is silent on that subject, I think that where, as in this case, the appeal is from an order, the practice of the late court of chancery should govern, as in that court appeals from interlocutory orders were allowed. As was remarked by Mr. Justice MITCHELL, in *Story agt. Duffy*, by the practice of that court, both in this

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state and in England, it was discretionary with the court, how far an appeal should stay the proceedings where no statutory provision interfered. (*See the cases cited in Story agt. Duffy.*)

The order appealed from was, in effect, the final order in the cause. As the pleadings stood, it finally determined the rights of the parties, and after the expiration of the twenty days, given to the defendant to withdraw the demurrer and answer the complaint, the defendant might have perfected his judgment, based upon the order appealed from. Had judgment been perfected before the appeal was taken, the appeal must necessarily have been from the judgment, under § 348 of the Code; and such an appeal would not have stayed the plaintiff's proceedings, unless the defendant, in addition to the undertaking he has given in this case, had given a further one to pay or satisfy the judgment appealed from if affirmed, or had obtained an order staying proceedings. (§§ 348, 345-349 of Code.)

The defendant obtains the same benefits and remedy from an appeal from the order as from an appeal from the judgment, and the former creates the same delay as the latter, and there is the same reason why security should be given as the condition of a stay of proceedings, in the one case, as in the other; or rather, if in either case an appeal was to be made a stay without security, it should be the appeal from the judgment rather than from the order, as in many cases the judgment itself is ample security. It is true, that the Code makes no provision for security in case of an appeal from an order, not even for costs; and it would be impracticable to provide for security further than for costs; but there is no restriction to the right to appeal in such a case as this, and if the appeal operates *per se* as a stay of proceedings, demurrers and appeals from the decisions thereon will be resorted to in all cases where delay is desirable.

The court has the power of staying the proceedings pending the appeal, and will exercise the power in all proper cases, and I think it was the intention of the legislature to leave the matter discretionary with the court. All the rights of the party appealing will be thus preserved, and the court will have the

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power of preventing these appeals from orders being made the means or instruments of delay and oppression. In fact, the appellant cannot, in such cases, be prejudiced by any proceedings taken subsequent to the appeal. The respondent will proceed at his peril. If the appellant succeeds, the effect will be to vacate and set aside the subsequent proceedings.

If an appeal from an order, when it sustains or overrules a demurrer, or when it grants or refuses a new trial, operates as a stay of proceedings in the cause, the same effect must be given to an appeal from every other order, unless a distinction is made between proceedings founded upon the order and other proceedings in the cause.

Cases may arise where subsequent proceedings may be had, which are independent of the order appealed from, and which the order, whether affirmed or reversed, will not affect; such as appeals from orders dissolving, or denying motions to dissolve injunction orders. But, in most cases of appealable orders, all subsequent proceedings in the cause are founded upon, or so far dependent upon the order, that a reversal thereof renders the proceeding nugatory, or at least irregular; and if an appeal is to stay such proceeding, a defendant, by making motions for the purpose of appealing from the orders denying them, by appealing from all orders made on behalf of the plaintiff, may postpone the determination of an action indefinitely.

For the above reasons, I am compelled to differ with the learned justice who decided the cases of *Emerson agt. Burney*, and *Trustees of Penn Yan agt. Forbes*, and to hold with Mr. Justice MITCHELL and the superior court of New-York, that the appeal does not stay the proceedings; and if I am right, the plaintiff is entitled to the order asked for.

The Republic of Mexico agt. De Arrangois and others.

SUPERIOR COURT.

THE REPUBLIC OF MEXICO agt. FRANCISCO DE ARRANGOIS,
BARTOLOMI BLANCO and RAMON PALANCA.

General Term, Dec., 1855.

Before OAKLEY, Ch. J., DUER, CAMPBELL and HOFFMAN,
Justices.

THIS case, decided at special term by HOFFMAN, Justice,
reported *ante page 1*, affirmed by the court.

ERRATUM.

IN the case of *The New-York and Erie Bank agt. Robert Codd*, on page 224, in the 2d paragraph from the bottom, and in the 3d line from the beginning, after the word "appeal," read as follows: "from an order at special term denying a motion to set aside an attachment issued by a judge at chambers. It was then *held*, that the plaintiff might read further affidavits at the special term in answer to the defendant's moving affidavits, and for the purpose of sustaining the attachment.

"In *White and others agt. Featherstonhaugh*, decided at special term in Dec., 1851, (7 *How. Pr. R.* 375,) a motion was made to set aside an attachment upon affidavits tending "

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 J. H. O.



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